THE MOTU PROPRIO
"Quantavis Diligentia"
AND ITS CRITICS

BY

THE ARCHBISHOP OF DUBLIN
(W. J. Walsh.)

With the Article contributed by Mgr. F. X. Heiner, Auditor of the Roman Rota, to the "Kölnische Volkszeitung, and an Appendix.

Dublin
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CONTENTS

INTRODUCTORY

THE publication, on the 30th of last December, of the letter mentioned on one of the first pages of this pamphlet,[1] led to a necessarily discursive newspaper correspondence in reference to the recent Motu Proprio. I think it advisable to put together here in permanent form, grouped under distinct and suitable heads, the more important of the points that came successively into prominence as the newspaper discussion went on. In doing this, I have introduced additional matter wherever I thought it would be useful for the purpose of illustration.

I have been told, over and over again, in the editorials of Protestant newspapers, and in letters published in those newspapers, that what I have written on the subject of the Motu Proprio is unsatisfactory, inasmuch as nothing that I could say as to whether the decree applies to Ireland or not, could amount to an authoritative decision on the point. As if I had not myself distinctly

[1] See page 7.

stated that such a decision could be given only by the Holy See! Then, on the other hand, quite inconsistently with that first line of criticism, I have been found fault with by others on the ground that I have not given what I find styled "an ex-cathedra decision," the very thing that I have been quite correctly told it was not possible for me to give!

Again, I have been asked how I can suppose that any opinion of mine could be regarded by Protestants, whether in England or in Ireland, as a sufficient assurance to them that, in the event of Home Rule being granted, the recent Motu Proprio will not be put in motion in such a way as to make impossible, in many cases, either the assertion of civil rights or the enforcement of the criminal law, in the courts of the realm?

All such observations as these, as I pointed out in one of my published letters, disclose an utter misconception of my purpose in writing.

I had nothing whatever to do with satisfying the Protestants, either of England or of Ireland, as to how the Motu Proprio or anything else will work out, whether under a Home Rule system of government, or under any other system of government.

My purpose in writing was an altogether different

one. A scare had been created in Dublin by the publication of the Motu Proprio in the *Daily Express* newspaper, in which that decree was displayed under a series of sensational headlines, representing it as "A Thunderbolt from Rome," and describing the issuing of it from the Holy See as "A New Papal Aggression." This, plainly, was bound to result in bewilderment, not free from alarm. It seemed to me that the consciences of many Catholics might be troubled, and that the case was one in which a public statement of the well-known canonical principles, in the light of which alone the erroneous view that had been so mischievously put in circulation, could be displaced, was urgently called for. Hence my letter of the 29th of December was written.

That letter did not, of course, purport to be more than what it was. It was not published as deciding anything. In publishing it I compared it to a legal opinion, given by counsel upon some point concerning the law of England. Did anyone ever think of treating an opinion of counsel as useless, or decline to act upon it, on the ground that it was not a decision of a Divisional Court, or of the Court of Appeal, or of the House of Lords?

My letter, then, was not meant to decide anything.

But it put forward a view of the case, acting upon which any Catholic in this diocese who might otherwise feel troubled about the matter could with an easy mind continue to pursue his ordinary course of action without regard to the Motu Proprio, in the absence of any authoritative decision to the contrary from the Holy See.

I can have little doubt, however, that the attempt to raise an outcry over the *Motu Proprio* will be revived in the hope of making some political capital out of it, when the coming Home Rule Bill is under discussion in Parliament. The same misrepresentations, the same fallacies, will be brought into play. That they have already been refuted will perhaps be more or less distinctly remembered. How they have been refuted will scarcely be remembered at all. Refutations that are to be found only by a search through the files of a newspaper are to all intents and purposes consigned to oblivion. It may, then, be of some utility to have the main points of the case brought together as they are in this pamphlet.

In Germany, after the publication of the Motu Proprio, *Quantavis diligentia*, that decree was turned to account by the opponents of Catholicity as a means of arousing,

in view of the elections then about to be held, the Protestant feeling of the country.

As occurred soon afterwards in Ireland, the most fantastic views as to the meaning and purport of the decree were sent out broadcast through the newspapers. But they were effectively met by an article [1] contributed to the well-known Catholic newspaper of Cologne, the *Kölnische Volkszeitung*,[2] by Mgr. Dr. Heiner, one of the "Auditors" of the Roman Rota.[3]

This paper of Mgr. Heiner was followed up by two others. With the kind permission of the publishers of the *Kölnische Volkszeitung*, the three papers, translated from the German, are printed in this pamphlet. But as the second and third papers deal only with criticisms directed against the first, they are here printed in an Appendix.[4]

✠ W. J. W.

DUBLIN,
14*th March*, 1912.

[1] See pages 66-79.

[2] Not to be confounded with the *Kölnische Zeitung*, a leading organ of the "National Liberal party," openly hostile to all Catholic interests and movements in Germany.

[3] As to the Rota and the office of "Auditor" of the Rota, see pages 64, 65.

[4] See pages 86-110.

THE MOTU PROPRIO
"Quantavis Diligentia"
AND ITS CRITICS

THESE Notes on the Motu Proprio, *Quantavis diligentia*, and its critics, may conveniently be divided into the following sections :—

SECTION I.—A Scare, and how it was met.

„ II.—The Motu Proprio considered as interpreting the Constitution, *Apostolicae Sedis*, of 1869.

„ III.—The Canon Law and Custom.

„ IV.—A marvellous "discovery," and what has come of it.

„ V.—Cardinal Cullen, the *Privilegium fori*, and the *Apostolicae Sedis*.

„ VI.—The Motu Proprio considered as an independent enactment.

„ VII.—The Motu Proprio in Germany and in Belgium.

SECTION I.

A Scare, and how it was met.

How the scare was started

On the 21st of last December, one of our Dublin newspapers, the *Daily Express*, published under sensational headings, stretching across two columns, and set out in exceptionally large type, a decree that had then recently been issued Motu Proprio by his Holiness the Pope.

The headings so prominently displayed were these:—

ANOTHER PAPAL DECREE

THUNDERBOLT FROM ROME

CLERGY AND THE CIVIL LAW

IMMUNITY FROM PROSECUTION

EXCOMMUNICATION FOR LAY LITIGANTS

A DRASTIC ORDINANCE

All this was admirably calculated to create alarm, not to say consternation, in Catholic circles, whether professional or commercial, not only in Dublin but throughout Ireland.

The Motu Proprio

The decree thus sensationally put before the public was that which, from its first words, is known as the *Quantavis diligentia*,—a decree issued on the 9th of October, 1911.

The Apostolicae Sedis

Under the Pontifical Constitution, *Apostolicae Sedis*, issued in 1869, the penalty of excommunication is incurred by those who, in violation of the *Privilegium fori*,—the old immunity of the clergy from the jurisdiction of the secular courts,—oblige lay judges to bring ecclesiastics before their secular tribunals (*Cogentes sive directe sive indirecte judices laicos ad trahendum ad suum tribunal personas ecclesiasticas praeter canonicas dispositiones*).

For a number of years after the issuing of this Constitution in 1869, it was generally assumed that wherever the clause *Cogentes*, above quoted, was in force, it referred to all persons who,—whether by taking an action or in any other way,—made it necessary for a secular Judge to compel the attendance of an ecclesiastic in his Court. But by a decision of the Holy Office given in 1886, the clause *Cogentes* was explained as referring to persons in a position of public authority, who, by legislation or otherwise, oblige the Judges of secular courts to bring ecclesiastics before those tribunals. Now, however, under the recent Motu Proprio,—whether that decree is regarded as an authoritative interpretation of the clause *Cogentes* of the *Apostolicae Sedis*, or as an independent enactment,—it is forbidden, under penalty of excommunication which will be incurred *ipso facto*,

to compel the attendance of ecclesiastics in the public Courts. And the decree could not be more general in its wording: "*quicumque privatorum, laici sacrive ordinis, mares feminaeve,*"—all these come under the decree.

A grave ecclesiastical penalty

Here, then, in this excommunication,—said to have been launched against the laity of the whole Catholic world!—were all the materials for a scare; and whatever might be considered wanting was supplied in abundance by editorial comments, by speeches at public meetings, and by letters of correspondents, published in the two Protestant daily newspapers of Dublin. No Catholic Judge, we were told, no Catholic Law Officer of the Crown, no Catholic Police Magistrate,—and, I think it was even said, no Catholic member of the Police force,—could discharge the duty that he is sworn to discharge, without incurring *ipso facto* the dread spiritual penalty of excommunication, if his discharge of that duty should involve the bringing of a Catholic priest into court, in any case whatsoever, even as a witness! And of course it was added that no member of the community, if libelled by a priest, could seek redress in a court of law, no shopkeeper from whom a priest had obtained goods on credit and refused to pay for them, could seek to recover his money by process of law, without—as one of the newspapers

The Judges: the Law Officers

The Police

Shopkeepers: the public at large

expressed it—" automatically " incurring the penalty of excommunication.

" A most profound sensation "

The day after the hysterical outburst in the *Daily Express*, the readers of that usually staid and unsensational newspaper were informed that the publication had caused " a most profound sensation throughout the entire country "; and that, " in legal circles," the decree " had also created a most profound sensation." With a becoming air of reserve and mystery, it was added that there was " reason to believe " that the matter had already been " under the consideration of the Law Officers and other high officers of the Crown in Dublin." But then came the disappointing conclusion: " it is not known what steps they have decided to take in connection with the matter."

At all events, as the writer of a specially contributed article in the same issue of the paper explained, there was a grave problem awaiting solution at the hands of the Lord Lieutenant and the Chief Secretary. It was a problem that would require " all the diplomatic, legal, and ecclesiastical skill at the disposal of the Castle." The Motu Proprio, it seems, would have to be incorporated in " the rules of civil administration." That,

High-class negotiations

of course, would be " a subject for high-class negotiations between the hierarchical authorities and the Irish Executive,"—negotiations to be conducted, needless to say, in secret, as " publicity is not always desirable in the progress of

such negotiations." How to introduce "such an extensive system of 'permits' or 'fiats' as may be necessary under the new circumstances, will," the writer continued, be a delicate problem. But, however this might be, the readers of the *Daily Express* were no doubt gratified at finding themselves assured, with a fine display of high-flown diction, that the claim now asserted by Rome was "a claim wider and more sweeping than was claimed in the heyday of the Papal hegemony from the days of Hildebrand to the Reformation"!

How the scare was kept up

It would be hard to say how much, or how little, of all this was meant to be taken seriously. At all events, even though it was only for a few days, the effort to keep up the scare was vigorously maintained in the columns of the newspaper that had started it. Amongst the further sensational headings then prominently displayed in that paper were the following :—

THE DECREE IN OPERATION

PUBLIC OPINION AROUSED

ROME'S LATEST AGGRESSION CONDEMNED

ACTION BY GERMANY

CARDINAL YIELDS TO GERMAN GOVERNMENT

EFFECT ON HOME RULE

CONSTERNATION IN NATIONALIST CIRCLES

Plainly there was need of something to check the mischief that was being done by all this. On the 29th of December, then, I addressed a letter to those of the Dublin daily newspapers that I thought most likely to be read by Catholics. In my letter I pointed out that the lurid representation of the decree that was being so energetically displayed before the public, was based upon a total misconception, both of the purport of the Papal document in question, and of the facts of the case.

The Archbishop's letter of 29th December

This may perhaps be the most convenient place to remark that, as I have already indicated,[1] two views have been taken of the recent Motu Proprio in its relation to the Constitution *Apostolicae Sedis* of 1869.[2] According to one of these, the Motu Proprio is a decree authoritatively interpreting the clause *Cogentes* in the Constitution of 1869. According to the other,

[1] See page 3.

[2] I should perhaps mention incidentally here that,—in correction by anticipation, of a mistake not unlikely to be made,—I pointed out in my letter of the 29th of December, to which I have already referred, that the Constitution of 1869 is not an enactment prescribing that certain things shall be done, or shall not be done. In other words, that Constitution created no new canonical offence.

It took the provisions of the Canon Law as it found them, and to each of a number of specified violations of that law it attached a specified canonical penalty, the penalty either of excommunication or of some lesser ecclesiastical censure.

I also pointed out that, even as to this, the Constitution of 1869 did not impose any new penalties. On the contrary, it superseded a number of earlier Pontifical enactments, including the Bull *In Coena Domini*, and thus very considerably reduced the number of canonical offences to which the penalty of excommunication was attached.

the Motu Proprio is an independent decree, leaving the Constitution of 1869 as it stood, and supplementing it by a new enactment.

In the result, however, for a country such as Ireland, there is no difference whatever. Both views lead to identically the same practical result.

From the experience I have already had in all this matter, I feel satisfied that if I were to deal with the Motu Proprio on either of the lines that I have indicated,—no matter which of the two I might take,—some critic would assuredly come forward alleging that I had dealt with it on the wrong line, and had therefore wasted my labour. Criticism of that kind can be forestalled in only one way; and that is, to deal with the Motu Proprio on both lines. That, therefore, is the course taken in the following pages.

Captious Critics

Of the two views that I have mentioned, I begin with the first,—treating the Motu Proprio as a decree authoritatively interpreting the clause *Cogentes* of the Constitution, *Apostolicae Sedis*, of 1869. This, I may remark, is the view taken of the Motu Proprio by Mgr. Heiner,[1] the Judge of the Roman Rota whose treatment of the subject has received such high official approval.[2]

[1] See page 74. [2] See pages 57-59.

SECTION II.

The Motu Proprio considered as interpreting the Constitution "Apostolicae Sedis" of 1869.

The Privilegium Fori

The first point to be determined here is whether the old *Privilegium fori*,—with the excommunication attached by the *Apostolicae Sedis* to the particular violation of the *Privilegium* mentioned in that Constitution,—is in force in this country.

Cardinal Cullen

As to that point, in view of its peculiar importance,—instead of relying exclusively upon my own view,—clear though my view always has been, of the point in question,—I preferred to adduce a testimony which I described as "of unquestionable authority," the testimony of Cardinal Cullen. That testimony is on public record in the evidence given by his Eminence in the Court of Queen's Bench in Dublin, during the trial of the action taken against him by Father O'Keeffe of Callan, in 1873.

What, then, did Cardinal Cullen say on the point now before us? He stated in the plainest possible terms that the old *Privilegium fori*,—with, consequently, the excommunication attached by the *Apostolicae Sedis* to the particular violation of the *Privilegium* mentioned in that

Constitution—does not apply to this country, since it does not apply to any country where there has prevailed against it, as there has long prevailed against it in Ireland, a custom invested with the conditions required by the Canon Law.[1]

He also mentioned the case of countries in which the *Privilegium* has been abrogated by virtue of a Concordat entered into between the Holy See and the civil authorities. But, as regards Ireland, there being no Concordat,[2] the exemption, he said, must rest on duly established custom alone.

That answer was given by his Eminence in reference, not only to Ireland, but to Great Britain and the United States of America as well.

As a striking illustration of his statement about the

[1] Some of my Protestant critics have made it a matter of complaint against me that I have adduced the testimony of Cardinal Cullen instead of giving them a statement of my own view.

Do they really ask me to believe that they would attach more weight to an opinion of mine than they would to an opinion of his Eminence's ?

I can conjecture only one reason for their strange preference. It would be easy for them to weaken the effect of any statement of my own view, put forward as such, by representing it as a mere piece of special pleading, put before the public just now in the hope that it might perhaps prove in some way useful for the extrication of the Home Rule cause from the desperate plight in which, as they have been loudly proclaiming, the Motu Proprio has placed it ! A statement of Cardinal Cullen's, made in 1873, all but forty years ago, could not well be dealt with in that way.

And, after all, how can they complain that, instead of stating my own view, I quoted Cardinal Cullen's ? Did I not quote his Eminence's statement as of " unquestionable " authority ? If that is not an expression of my own view of the matter, I do not know what is.

[2] Concordats are entered into by the Holy See, only with the head of a State, monarchical or republican as the Government of the State may be.

United States, he mentioned the case of a Synod of the Bishops of the United States held at Baltimore in 1866. At that Synod, a decree was passed to the effect that no person, ecclesiastic or layman, should bring an ecclesiastic before a lay tribunal. But when that decree was passing through the usual revision at the Holy See, it was cut down in two respects. First, the application of it to laymen was simply struck out. Secondly, even as regards ecclesiastics, the decree was restricted to the case of an ecclesiastic impleading another ecclesiastic in a secular court, in reference to an ecclesiastical matter.

A striking illustration

Asked in cross-examination, whether, notwithstanding all this, a breach of the old ecclesiastical immunity, or *Privilegium fori*, is not a violation of ecclesiastical law, his Eminence answered: "It is a breach of the law as it was, not of the law as it is now brought down by custom."

The law "brought down" by custom

But here it was asked by Father O'Keeffe's counsel, how could this position be maintained by his Eminence? The whole trouble in Father O'Keeffe's case arose out of certain disagreements between him and his Bishop, in the course of which he had taken an action against the Bishop, had then been suspended for this as a canonical offence, and finally was suspended for it by Cardinal Cullen, acting as delegate of the Holy See. If the law against bringing

A dilemma

ecclesiastics into court had been abrogated by custom, how could it be held that Father O'Keeffe had committed any canonical offence by taking an action against his Bishop?

Nothing could be simpler than the answer to all this. Neither the old *Privilegium fori*, nor the excommunication decreed in the *Apostolicae Sedis*, had anything to do with Father O'Keeffe's case. Quite independently of these, ecclesiastics are forbidden to bring other ecclesiastics before the secular courts. This was easily shown. In proof of it, the expert witnesses in the case referred to a canon of the 4th General Council of Chalcedon, held in 451; to several decrees of Popes; and to the decrees of several Councils held in various countries, and, amongst the rest, in Ireland.[1]

An important canonical prohibition

This, as the Cardinal pointed out, is "a very limited law,"—a law "for clergymen in reference to other clerics." Now it was under this law that Father O'Keeffe's case had been dealt with by his Eminence throughout. It was an

A wholly distinct law

[1] It is, of course, understood that these various enactments were not referred to at the trial with a view of showing that, in Ireland or elsewhere, an ecclesiastic who brings another ecclesiastic into court thereby incurs any censure or other canonical penalty.

What they show is that the matter with which they deal,—the impleading of an ecclesiastic, by an ecclesiastic, in the secular courts,—is, in the mind of the Church, a serious ecclesiastical offence, and that it can, therefore, if persisted in after due warning, be punished by the infliction of a canonical penalty, as was done in the case of Father O'Keeffe, first by his own Bishop, and then by Cardinal Cullen.

obvious fallacy to infer that, because this special law, which affected only the clergy, applied to Ireland, therefore there was in force in Ireland the *Privilegium fori*, which affected not only the clergy but the laity as well.

SECTION III.

The Canon Law and Custom.

In the answer of Cardinal Cullen above quoted,—that the old canonical law of the *Privilegium fori* has been "brought down" by custom,—we find the key to the solution of a difficulty which, not perhaps unnaturally, was regarded by certain critics of my letter of the 29th December, as insoluble. I say, "not perhaps unnaturally," for I do not know how anyone could see his way to a solution of it who had not some elementary knowledge of Canon Law. On the other hand, I must add that a very elementary knowledge of that law would suffice to enable anyone of ordinary intelligence to see that there is no difficulty whatever in the case.

An instructive answer

Here is the supposed difficulty. A Papal decree enacts that a person who does a certain thing,—for instance, a layman who takes an action against a priest in a civil court,—is excommunicated. On the other hand, a canonist, taking the concrete case of a person who does the very thing in question, nevertheless assures us that the person is not excommunicated. How is this to be explained? Is it, I have been asked, that the Canon Law means the very opposite of what it says?

An apparent difficulty

Nothing of the kind. And I may remark that the explanation of the particular point thus raised will serve also to explain another matter that might otherwise seem inexplicable,—namely, how it is that lawyers, men even of good standing in all that relates to the laws of England, may be found completely at sea when they undertake to interpret Pontifical documents such as the Constitution *Apostolicae Sedis* of 1869, or the recent Motu Proprio. We have at hand a signal instance of this.

Amateur Canonists

Cardinal Cullen, in the course of his evidence already referred to, spoke of three ways in which an ecclesiastical law should be taken not to apply to a particular country. The first is when a country is expressly excluded from the operation of the law by the terms of the law itself.[1] The second is when a country is excluded from the operation of the law by an agreement or Concordat between the Holy See and the head of the State. The third is when, in any country, a duly constituted custom has prevailed against the law in question.

Cardinal Cullen's statement of the Canon Law

That is the Canon Law of the case, laid down by commentators, and acted upon by those by whom that law is officially adminstered. Yet, notwithstanding all this, we find a leading member of the Irish Bar simply

[1] A case specifically referred to as to this was the restriction, by the Council of Trent, of the law of clandestinity to those places in which the law was specially promulgated.

throwing it aside, and setting up in place of it a widely different canonical doctrine of his own invention !

In a speech recently delivered at Coleraine, Mr. Campbell, after leading his hearers to suppose that I had acknowledged I could not say whether the recent Motu Proprio applies to Ireland or not (!),[1] went on to say that he could give them the information himself. I quote from the *Daily Express* report of his speech :—

> He (Mr. Campbell) could give them the information ; he could tell them that it did apply to Ireland.
>
> These decrees of the Pope applied, except to places which were excluded, either by name, or otherwise by agreement.[2]

Thus, whilst Cardinal Cullen, dealing with the matter as an expert in Canon Law, detailed three cases of exemption :—(1) express exemption by the law itself; (2) exemption by Concordat ; (3) exemption by virtue of a duly established custom,—Mr. Campbell, in the exposition which he took it upon himself to give of this same point of Canon Law, tells the people of Coleraine, and, through

Mr. Campbell's Canon Law

[1] I use the expression " leading his hearers to suppose," because Mr. Campbell did not say in so many words that I had acknowledged my inability to say whether the decree applied to Ireland. His statement was a peculiarly involved one. He said that I had made a statement " the result " of which " in effect " was to say that I could not say whether the decree applied to Ireland !

On this supposed statement of mine as to the point of Canon Law in question, Mr. Campbell made the very just observation,—" a rather peculiar position for one who would have to administer it." Quite so ; but, as it happens, I never made the statement referred to. I could not, indeed, have made it, for it would be untrue.

May I add that I am at a loss to know how any statement that I ever made could have been mistaken for what I find ascribed to me ?

[2] *Daily Express*, 8th January, 1912.

them, the Protestant public at large, that the cases of exemption are, not three, but two! Express exemption by the law itself, he admitted. Concordats or agreements, he admitted. But custom,—the only one of the three exempting causes that bears upon the matter in hand,—he did not even mention: indeed he directly excluded it from consideration!

Ireland, then, not being expressly exempted by the Motu Proprio itself, and there being no Concordat in this country,[1] Mr. Campbell triumphantly assured his hearers that the decree applies to Ireland!

Lest it should be supposed that I am merely summarising or paraphrasing, and thereby in any way distorting, the report of this part of Mr. Campbell's speech, I quote it, word for word, from the *Daily Express* as follows:—

> These decrees of the Pope applied, except to places which were *excluded* either *by name*, or otherwise *by agreement*. Ireland was *not excluded*, and there was *no agreement* between the Vatican and the English Government to exclude her.
>
> Therefore this decree did apply to Ireland.[2]

A not unnatural oversight

To those who know anything about the Canon Law, the mistake that underlies all this is a very obvious one. And it is, I may observe, a mistake that might not unnaturally be fallen into by any member of the bar,—and perhaps

1 See page 10, footnote 2. 2 *Daily Express*, 8th January, 1912.

the more eminent in his profession, the more likely would he be to fall into it,—if he undertook, without other guidance than that derived from his own knowledge of law and of legal matters, to interpret a canonical enactment such as the *Apostolicae Sedis* or the recent Motu Proprio.

Going to work in that way, Mr. Campbell has, not unnaturally, failed to notice the important position of custom in the Canon Law.

Here, then, are some few elementary principles of the Canon Law. They deal with custom in its relation to law:—

Elementary principles of Canon Law relating to Custom

1. Canonists distinguish between three kinds of custom: custom *juxta legem*, *praeter legem*, and *contra legem*.

2. A custom *juxta legem* interprets the law. A custom *praeter legem*, going in advance of law, occupies a field not yet covered by the law, and may under certain conditions become as obligatory as any law would be. A custom *contra legem* may, under certain conditions, extinguish the obligation of the law to which it is opposed.

This third division of custom is the only one that has any reference to the matter here in hand.

3. The efficacy of a custom *contra legem* in extinguishing the obligation of any general ecclesiastical law, lies

altogether in the consent of the Pope.[1]

Consent of the Pope

4. As to this necessary consent of the Pope, canonists distinguish between "personal" and "juridical,"—or, as it is also called, "legal,"—consent. The Pope's "personal" consent supposes that he is aware of the existence of the custom in question, and either formally expresses his approval of it, or at least acquiesces in its continuance: thus his "personal" consent may be either "express" or "tacit." "Juridical" or "legal" consent is of a quite different kind.

5. This "juridical" or "legal" consent, as its name not obscurely indicates, has its root in certain provisions of the law itself. It is worthy of note that the principal text quoted by the canonists as the foundation of the doctrine that an ecclesiastical law may be abrogated by custom is a text of the Roman Civil Law.[2]

The Roman Civil Law

[1] Speaking of the general laws of the Church, Schmalzgrueber (*Jus Ecclesiasticum Universum*, Part 1. t. 4. § 4. n. 15), says: "nemo potest statuere legem et statutam abrogare, nisi qui potestatem habet ferendi legem: ergo absque hujus consensu non potest induci consuetudo quae vim legis habeat."

[2] "Rectissime etiam illud receptum est, ut leges *non solum suffragio legislatoris*, sed etiam *tacito consensu omnium* per *desuetudinem* abrogentur" (Digest, lib. i. t. iii. n. 32). See Hunter, *Roman Law* (4th ed.), p. 119.

This is an interesting illustration of a fundamental principle of the Canon Law, that in any matter, which is not of a spiritual nature, and as to which the Canon Law has made no provision, the provisions of the Civil Law are accepted, and thus become, as it were, incorporated in the Canon Law. "Canonised" is the technical term applied to the provisions of the Civil Law thus taken over. See, for instance, Reiffenstuel, *Jus Canonicum Universum*, Prooemium, nn. 225-227.

This is supplemented by one of the decretals of Gregory IX, the decretal *Cum tanto*,[1] which lays it down that a custom cannot prevail against a law unless that custom is " rationabilis " and " legitime praescripta."[2]

" Rationabilis "

6. Now, what does " rationabilis " here mean? Can a custom be, in the canonical sense, a " reasonable " one if it runs counter to an ecclesiastical law? Undoubtedly it can. For if it could not, no custom could ever prevail against such a law. The word " rationabilis," then, is here taken in a technical sense: a custom is considered reasonable if the law to which it runs counter is one that could justly be repealed by law.[3]

Hence a custom cannot be " rationabilis " if it is at variance with the natural, or with the divine, law. But the mere fact of its being at variance with an ecclesiastical law does not make it " irrationabilis."

" Reprobated " customs

Canonists are agreed that a custom which is " reprobated " by the Canon Law cannot prevail against that law. A custom is said to be " reprobated " if the legislator, in addition to making a law, expressly prohibits the introduction, or the continuance, of any custom at

[1] *Cum tanto* 11 *de Consuetudine.*

[2] The " juridical " or " legal " consent, which, by virtue of certain provisions of the law, is given by the Pope to customs, of the existence of which he may have no knowledge whatever, but which fulfil the two prescribed conditions, is sometimes also designated " tacit."

[3] " Bona et rationabilis habenda erit consuetudo quando tale erit ipsius objectum quod *potuisset esse objectum justae legis.*"—Craisson, n. 119.

variance with that law, or declares any such custom to be " irrationabilis," or a " corruptela legis."

7. A custom that is to prevail against a law must also be " legitime praescripta." This has reference to the length of time for which the custom has continued.

" Legitime praescripta "

As to this, there is more than one question of detail. It is sufficient here to state that as to the time required that a custom may become " legitime praescripta," the shortest time required by any opinion that has received support amongst canonists, is ten years, and the longest, forty years. Not improbably, ten years will suffice.[1]

The requirement of any definite length of time does not, of course, apply to a case in which the Pope is aware of the existence of the custom, and " personally " consents to it.[2]

8. A custom may prevail against a law in various ways. These may be reduced to two. Custom may hinder

Various ways in which custom may prevail against a law

the law from coming into operation at all in a particular place. Or it may bring the obligation of a law to an end in a place after the law has been in force

[1] See Benedict XIV, *De Synodo Dioecesana*, lib. 13, cap. v. n. 4.

[2] " *Legitime praescripta* sit oportet consuetudo. Quae conditio . . non requiritur si ad consuetudinem facti accesserit *expressus* vel *tacitus* legislatoris consensus.

" Quamprimum enim de illo tacito consensu ex factis concludentibus constat, jam ante lapsum temporis ad praescriptionem legitime requisiti, validum habetur jus consuetudinarium."—Wernz, *Jus Decretalium*, vol. i. n. 190, iv.

there, and in force perhaps for years or even for centuries.

9. There are certain forms of words which, inserted in a law, will hinder a contrary custom, or some particular kind of contrary custom, from prevailing against the law. If it is desired that a law should have binding force notwithstanding any previously existing local custom to the contrary, some form of words canonically recognised as sufficient for the purpose must be used.[1]

Technical forms of words

Now in all this, presented though it is in the barest outline, we have a sufficient indication of the existence of what every canonist knows to be an important section of the Canon Law,—a section of that law, both comprehensive and detailed, in view of which Mr. Campbell's airy tossing aside of Cardinal Cullen's expert statement as to the effect of custom in Canon Law, must seem, to say the least of it, rather ludicrous.

In a recent speech at Ballymena, Mr. Campbell assured the people of that place that the Canon Law has been "a special study" of his. I may assume that this refers to the only Canon Law that comes into question here—the Canon Law of the Catholic Church,—and, in so far as the statement was meant to

A "special study" of the Canon Law!

[1] See pages 54-56.

be taken seriously, I, of course, accept it as a statement of what Mr. Campbell takes to be a fact. But I must add that no one who knows anything of the Canon Law could have been prepared for such a statement.

Mr. Campbell's reported words make it obvious that he knows simply nothing of those numerous provisions of the Canon Law that deal with the extensive and important subject of custom, and with the efficacy of custom, whether to hinder a written statute from coming into effect, or to override it after it has come into effect. And as if this was not enough, we find him completely failing even to recognise the existence of those provisions after they have been brought, not only plainly, but prominently, under his notice in Cardinal Cullen's explicit statement!

I have said more than once of late, that nothing but disaster can await the efforts of anyone who, unaided by expert advice, undertakes to deal with the provisions of any system of law in which he has not had the advantage of a professional training. Some critics have perverted this remark of mine, as if what I had said was, that none but professional canonists could hope to grapple successfully with the mysteries or intricacies of the Canon Law.[1] But that was not at all

A perverted remark

[1] Two typical quotations will suffice. The Dublin correspondent of *The Times*, in his letter published in *The Times* of January the 5th, had the following in reference to a letter of mine which had appeared in the *Freeman's Journal* of the preceding day:—

what I had said. My remark had no special reference to the Canon Law. It applied to all systems of law without exception. All practising members of the bar fully appreciate the folly of the amateur lawyer. Should not the folly of the amateur canonist or theologian be equally manifest to them? Am I to assume that it is not?

What I wrote in the *Freeman's Journal* of the 30th of last December was this :—

"The Canon Law is a highly developed system of law, and it can hardly need to be pointed out that *the reading of a legal treatise* by a person *of no professional training* in *the system of law with which the treatise deals* is one of the surest ways of going hopelessly astray."

My remark as to the difficulty, or rather, I should say, the impossibility, of picking up a knowledge of the provisions of a system of law by the mere reading of books, is, it may be seen, of an absolutely general character.

Later on, in a letter published in the *Freeman's Journal* of the 3rd of January, I remarked, in a no less general way, on the danger of serious error to which persons even of highly trained intelligence expose themselves if they proceed, without competent ex-

"Archbishop Walsh *insists once more* that *the lay intelligence*, however highly trained, cannot hope to grapple with *the intricacies of the canon law.*"

And the *Globe* of the same day had the following :—

"We must derive such comfort as we can from *the archiepiscopal pronouncement* that *no lay intelligence* can hope to grapple with *the intricacies of canon law.*"

pert aid, to grapple with the intricacies of "a legal system in which they have not had the advantage of a professional training."

In all this, there was no question of the Canon Law, as distinct from any other law. But lest there should be any mistake about it, I made it plain that what I said applied equally all round. As I put it :—

> There is not, surely, a lawyer in the Four Courts who would not ridicule an attempt by anyone not a lawyer to expound for the benefit of the public the meaning of some section of an Act of Parliament, or to define the class or classes of cases to which a principle affirmed by some judgment of a Court should be taken to apply.

And again :—

> Now surely it ought to be obvious to lawyers that all this is *as applicable to themselves* if they undertake to deal with a system of law, such as the Canon Law, in which they are in no sense experts, *as it would be to an ecclesiastic* if he were *guilty of the folly which I have just described.*

This, then, is the point to which I wished to direct attention,—and I do not regret that the misrepresentation of what I have said gives me the opportunity of repeating it, and so of emphasising it,—that in the case of *any system of law*, civil or ecclesiastical, it amounts to nothing short of presumptuous folly for anyone,—no matter how skilled he may be in another system of law,—to take it upon himself to interpret or to apply, without expert guidance, the principles or the provisions of a legal system in which he has not had the advantage of a professional training.

It so happens, indeed, that in the particular matter

that we are dealing with here,—the provisions of the Canon Law relating to custom,—there is a pitfall which, to members either of the Irish or of the English Bar, and perhaps in an especial degree to those of them who are most deeply absorbed in the work of their profession, can hardly fail to prove a source of serious danger. The pitfall lies in this, that the provisions of the Canon Law relating to custom, when considered in their relation to English law, stand in a very peculiar position, —a position indeed so peculiar that no one need feel surprised that any member of the bar should go hopelessly astray in reference to them, or should even fail to advert to the fact that there are any such provisions in existence at all.

Custom in English law

For, if I am not mistaken, custom, as having force to set aside an enacted law, finds no recognition in the law of England.

Up to a certain point it would seem that the law of England and the Canon Law keep on fairly parallel lines.

Take, first, the custom that is *juxta legem*. The canonists hold that such a custom is a sound interpreter of law, and they have a maxim which, adopted as it has been by English lawyers, shows how closely the two systems of law agree in this : *Optima legis interpres consuetudo*.

Parallel lines

Take, next, the custom that is *praeter legem*. The law of England, as well as the Canon Law, recognises that a

binding law may be built up by such a custom. It was, as is well known, held by not a few English jurists that the whole Common Law of England has grown up from custom alone,—consisting, as Blackstone describes that law, of "doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support."[1] I am aware that in more recent times this view of the English Common Law has been largely modified; but still the statement holds good, that custom can give rise to a binding law, "for the particular place, persons, and things concerned."[2]

A wide divergence

But here the resemblance between the Canon Law and the law of England ends. For, as to custom *contra legem*, in English law, "no custom," as Blackstone expresses it, "can prevail against an express Act of Parliament."[3]

Custom in Scotch law

Not unremotely connected with all this is an interesting point, hardly out of place to mention here, that, in Scotch law, "a positive custom or action to the contrary" continued for a sufficient length of time, can override a law, and that this applies to Acts of Parliament enacted in Scotland before the union with England.[4] The reason of this is sufficiently obvious. Scotch law, like the

[1] Commentaries, vol. i. p. 68.

[2] See Sir J. Davys (*Case of Tanistry*, pp. 31, 32), quoted, Pollock, *First Book on Jurisprudence*, p. 164; London, 1896.

[3] Commentaries, vol. i. 76.

[4] See Green's Encyclopædia of Scots' Law, vol. iv. art. 'Desuetude.'

Canon Law of the Church, is to a large extent based on the old Civil Law of Rome, and, as we have seen, it is from the Civil Law of Rome that the canonical doctrine of the efficacy of custom to prevail over a positive law, and virtually to repeal it, is in great measure taken.[1]

Custom and Acts of Parliament

It may be well to quote here from a very recent judgment a distinct statement of the law of England, as to the impossibility of a statute being over-ridden by custom.

Lord Atkinson, in delivering a considered judgment in a case in the House of Lords, said:—

> As against a plain statutory law, no usage can prevail.[2]

In view of this, we cannot perhaps wonder that a member of the bar, all but incessantly engaged in the practice of his profession, and absorbed in the application of the principles of English law to the countless cases that come up for consideration in the course of a busy professional life, should, when looking through some manual of Canon Law, wholly overlook a set of principles, such as those that deal with the efficacy of a custom *contra legem*,—principles that not only find no place in the law with which he is familiar, but are directly at variance with it.

But an anomaly remains, that is not at all so easily accounted for. Mr. Campbell, strange to say, is evidently convinced that his experience in construing Acts of

[1] See page 19, and *ib.*, footnote 2.
[2] Times' Law Reports, vol. xxviii. p. 101.

An odd notion

Parliament has not only fitted him, but has fitted him in a very exceptional degree, to come before the public as an interpreter of canonical documents! Thus, in his recent speech at Ballymena, after a reference to Cardinal Logue, and to his Eminence's having been in Rome "at or about the time this decree was published," Mr. Campbell continues in this peculiar strain:—

Just as well as a Cardinal!

He ventured to say that he (Mr. Campbell) could give (Archbishop Walsh) some help *just as well as Cardinal Logue* (!), as for many years he had been engaged in the profession of the law, and during that time it had been his duty to study and interpret Acts of Parliament, and he thought that he knew what the English language meant (!)[1]

There, I should say, stands revealed the whole secret of Mr. Campbell's breakdown over the Papal decree. He looked upon it simply as a piece of "language,"[2] and he set about construing it just as he would construe an Act of Parliament,—thus overlooking the essential point that there were applicable to the decree certain important principles of the Canon Law,—principles that are in no way applicable to Acts of Parlia-

[1] *Daily Express*, 10th January, 1912.

[2] As Mr. Campbell speaks of "language," and of his knowledge of what "the English language" means, it is not out of place to note, that the Motu Proprio is, of course, written, not in English, but in Latin.

And as to the bearing of this remark, see pages 36, 37.

ment, but that have to be applied in the interpretation of Papal decrees if those who undertake to interpret them are to keep clear of disastrous error.

It would not indeed be easy to find a more striking illustration of the truth of the words in which Cardinal Newman points out one of the chief difficulties that confronted him, when he felt called on to take upon himself the task of replying, as he did with triumphant success, to Mr. Gladstone's petulant "Expostulation" upon "Vaticanism." It is the difficulty that lies, as Newman has so happily expressed it, "in getting people, as they are commonly found, to put off the modes of speech and language which are usual with them, and to enter into scientific distinctions and traditionary rules of interpretation, which, as being new to them, appear evasive and unnatural."[1] And as he says, when speaking, elsewhere in the same letter, of the recognised rules of interpreting theological or canonical documents, "some of these rules are known to all priests," but "even this general knowledge is not possessed by laymen, much less by Protestants, however able and experienced in their own several lines of study or profession."[2]

[1] J. H. Newman, *Letter addressed to his Grace the Duke of Norfolk on occasion of Mr. Gladstone's recent Expostulation*: London, 1875.

[2] *Ibid.*

SECTION IV.

A MARVELLOUS "DISCOVERY," AND WHAT HAS COME OF IT.

This seems to me a convenient place to refer to a matter in which I am somewhat personally concerned.

In the *Daily Express* of the 18th of January, there appeared the following:—

Does the Decree apply to Ireland?

Twice in these columns has Archbishop Walsh been specifically asked to give a straight answer to a straight question, Does the Decree apply to Ireland? He has not yet condescended to make reply, and . . so far as he is concerned, the matter is still in doubt.[1]

Fortunately, however, there are other sources of information, at least as reliable and considerably more authoritative.

Not only does the Motu Proprio, *Quantavis diligentia*, apply to Ireland, but ARCHBISHOP WALSH IS PERFECTLY AWARE OF THE FACT.[2]

The Synod of Maynooth in 1875

The Synod of Maynooth was held in September, 1875. Twenty-seven Bishops and the Abbot of Mount Melleray took part in the various sessions. Each Bishop took with him a consulting theologian, and we find the Rev. W. J. Walsh, S.T.D., Professor of Theology in the College of St. Patrick's, Maynooth, in attendance on the Bishop of Ossory who was better known afterwards as Cardinal Moran, lately deceased.[3]

[1] See page 10, footnote 1.

[2] I trust I shall be excused for having these words printed with special emphasis.

[3] *Daily Express*, January 18th, 1912.

The object of all this is plain, though the logic of it is rather loose. The idea is that something was done at the Maynooth Synod of 1875 which proves that the Motu Proprio of 1911 applies to Ireland, and that, as I was at Maynooth during the Synod, as consulting theologian to the then Bishop of Ossory,—I must have known all that was done there, and must consequently be aware that the Motu Proprio applies to Ireland.

Now, I have no objection to give the editor some little help towards making out his case, and I willingly place at his disposal the following not unimportant contribution.

Not only was I at Maynooth during the Synod of 1875, as consulting theologian to one of the Bishops, the late Cardinal Moran,—which might, or might not, have made me acquainted with everything that was being done in the Synod,—but I was, moreover, appointed by Cardinal Cullen to be one of the Secretaries of the Synod itself. And, as a result of that appointment, I was present at all the Sessions of the Synod, and at all the meetings of the Bishops, public and private. Not only that, but every document in any way connected with the Synod and its proceedings was entrusted to my care, and passed through my hands. The editor evidently was not made aware by his informant that all this is on record in the published Acts of the Synod, for the

Disclosures

information of anyone who can read even a little Latin of the very simplest kind.

Let us, however, proceed with the extract from the *Daily Express* :—

The Acts and Decrees of the Plenary Synod of Maynooth held in the year 1875, were published by Browne and Nolan. Latin is the language used, except in the case of a "Pastoral Address of the Archbishops and Bishops of Ireland, assembled in National Synod at Maynooth, to their flocks."

This, of course, was published in the Press, while the various Acts and Decrees lay buried in a dead language.[1]

"Buried"!

This reference to official documents drawn up in the official language of the Church as being "buried" in a dead language, makes it, I must say, easier than it would otherwise be, to understand how a certain mistranslation to which I shall have occasion to refer a little farther on,[2] was possible. But we now reach the culminating point of the great "discovery" :—

Cardinal Cullen presided [at the Synod] as "Apostolic Delegate."

Now it seems a little strange that at page 88, in treating of Censures, not only is the Decree, *Apostolicae Sedis moderatione*, issued by Pope Pius IX, 12th October, 1869, quoted, and its origin, object, and contents briefly explained, but the entire text of the Constitution, with its numerous censures or excommunications *latae sententiae*, is given at page 351, under Appendix II.[3]

[1] *Daily Express*, January 18th, 1912.
[2] See pages 36-37.
[3] *Daily Express*, January 18th, 1912.

The object of all this, of course, is to show that I must be well aware that the recent Motu Proprio is binding in Ireland, since, at the Synod of Maynooth, in 1875, at which I was present, the Constitution, *Apostolicae Sedis*, was treated by the Synod throughout its proceedings as binding in Ireland.

Further disclosures

Here, as it happens, I am in a position to make a further important contribution to the building up of the editor's case. Not merely was I aware of the reference made by the Synod to the *Apostolicae Sedis* in the chapter referred to, *De Censuris*, but it was I who drafted that chapter, including, of course, the reference in it to the *Apostolicae Sedis*. And the chapter now stands amongst the Decrees of the Synod precisely as it left my hands in draft, without one word of change. If the editor had only known that simple fact, by how much shorter a road could he not have reached his conclusion!

His conclusion, when at length he reaches it, is, as may be seen, a rather lame one. What he set out to prove was that—

> Not only does the Motu Proprio *Quantavis diligentia* apply to Ireland, but ARCHBISHOP WALSH IS PERFECTLY AWARE OF THE FACT.

Instead, however, of proving that, or proving anything of the kind, he ends by asking a number of

questions of a purely irrelevant, and indeed rambling, character. He asks :—

If the Constitution *Apostolicae Sedis* is binding in Ireland, as we have shown it to be, why should not the Pope's comment on par. 7 ?

And then by way of conclusion, he goes on asking,—

Has Archbishop Walsh been guilty of the *suppressio veri* or the *suggestio falsi ;* and what use will Monsignor Heiner's papers on the Motu Proprio be when they arrive,[1] for all the world knows the decree is not received in Germany ?

Now, leaving Mgr. Heiner and his articles out of consideration for the moment, I may well ask the worthy editor, Where does either the *suggestio falsi* or the *suppressio veri* come in ? He set about proving, by means of an elaborately detailed statement, that, as far back at all events as 1875, I must have known that the *Apostolicae Sedis* was binding in Ireland. Of course I knew it. But what is supposed to follow from that?

Cardinal Cullen surely cannot be regarded as a " minimiser " in the matter of Papal authority and the authority of Papal documents. He knew, of course, that

[1] The reference here is to a statement of mine in the public press that Mgr. Heiner, a German canonist of repute, who is now one of the Judges of the highest court of Canon Law in Rome, and consequently in the world (see pages 64, 65), had written a valuable article on the Motu Proprio in its relation to Germany, showing that, on the ordinary principles of Canon Law, that decree does not apply to Germany.

I stated also that I was seeking permission to have the article translated into English, as I thought its publication here would be useful,—the principles of Canon Law on which Mgr. Heiner relied as applicable to Germany being in all respects applicable to Ireland as well.

For Mgr. Heiner's article referred to, see pages 66-79.

the *Apostolicae Sedis* was binding in Ireland. Yet, as we shall see in the next section, he held, and held firmly, that, as to any interference with the bringing of ecclesiastics into court by laymen,—this being the only thing that we have to do with here,—that Constitution is of no effect in this country. How, then, can any knowledge of mine that the *Apostolicae Sedis* is binding in Ireland be supposed to bring in the Motu Proprio ?

A mistranslation and its consequences

The fact is, that what has set the *Daily Express* astray in all this matter is a blunder in translation, to which I referred in one of my published letters. Under the clause *Cogentes* of the *Apostolicae Sedis*, excommunication is incurred by those who oblige lay Judges to compel the attendance of ecclesiastics in their courts, "*praeter canonicas dispositiones.*" This last clause the expert Latinist of the *Daily Express* translates, "without a canonical *dispensation*" !

Now "praeter canonicas dispositiones," does not mean, and could not mean, "without a canonical dispensation." What it does mean is, "contrary to canonical provisions," or, in other words, "contrary to the provisions of the Canon Law."

Thus we see that those three words, "*praeter canonicas dispositiones,*" make an exception that is of vital importance in the case. The excommunication of the clause *Cogentes* is not decreed against all who oblige lay Judges to compel the attendance of ecclesiastics in their courts.

It is decreed against those who do this in violation of the Canon Law.[1]

There must first, then, be a canonical offence. It is to that offence that the clause *Cogentes* attaches the penalty of excommunication. But, there being no canonical offence in the discharge of their duty by our Catholic Judges, and Catholic Law Officers of the Crown, our Catholic Police Magistrates, and Catholic Policemen, and our laity in general,[2]—who were so ludicrously paraded before the public a few weeks ago as the unhappy victims of the Motu Proprio,—there is in their case no offence to which an ecclesiastical penalty can be attached, and so, no ecclesiastical penalty is incurred.

But we must not forget the reference in the *Daily Express* to Mgr. Heiner. I am asked, "What use will Mgr. Heiner's papers on the Motu Proprio be when they arrive?"—for, the writer goes on to say, "all the world knows the decree is not received in Germany!"

Now here is a real *suggestio falsi*, the suggestion, namely, that the decree was meant to be binding in Germany, but that the Germans refused to "receive" it, and so got off scot free. Now what "all the world" really knows is that there is not a particle of truth in

A real Suggestio Falsi

[1] "Necesse est ut cogant trahere *praeter canonicas dispositiones*; itaque non tenentur hac excommunicatione eos trahentes *in casibus a dicto jure permissis.*"—D'Annibale. *Commentarii*, Can. ii. n. 66.

[2] See pages 4, 5.

that presentment of the case, or in any such presentment of it.

That the Motu Proprio does not apply to Germany is the result simply of the well-known fact that, in Germany the *Privilegium fori* has long since ceased to be of force.[1] And, in this respect, what is true of Germany is true of Ireland as well. But in all this, as is manifest, there is no question of the Motu Proprio being "received" or not being "received," whether in Germany or in Ireland. In this matter, Ireland and Germany stand upon exactly the same footing. And, therefore, the Motu Proprio no more applies to Ireland than it does to Germany.

[1] See Mgr. Heiner's paper, pages 66-79.

SECTION V.

Cardinal Cullen, the "Privilegium Fori," and the "Apostolicae Sedis."

In his evidence in the O'Keeffe case, Cardinal Cullen, as we have seen, stated with unmistakable distinctness that the law forbidding laymen to bring ecclesiastics before the secular courts was no longer in force in Ireland.

As the matter is of special importance in this section, I may refer here to the Cardinal's evidence somewhat in detail. I take, as specimens, a few of his answers. After some questions put to his Eminence had been answered by him, as to the offence committed by an ecclesiastic who proceeds against another ecclesiastic in the civil courts, the cross-examining counsel passed on to the case of the laity :—

Mr. Purcell, Q.C.—Does that rule apply equally to lay members who sue ecclesiastics; as to clerics?

His Eminence.—At present it does not . . . In the middle ages it applied *equally to laymen and clerics.* . . .

* * * * *

If a layman sues a cleric?

Mr. Purcell.—As a matter of fact, does a Roman Catholic layman incur any, and what, censure; is he guilty of any, and what, offence against the common law, or against the systematised law, of the Church, if he sues a cleric in a court of law?

His Eminence.—In nearly every country now there are concordats with the Holy See, which expressly declare that

. . rights of property and matters of that kind may be decided in a civil court. In these cases a layman has nothing at all to answer for. In countries where there is no concordat, such as this country, . . the Holy See has declared that breaches of ecclesiastical immunity are to be overlooked. . .

* * * * *

Mr. Purcell.—But still breaches of the law?

His Eminence.—It is a breach of *the law as it was;* not a breach of *the law as it is now brought down by custom.*

Was the Privilegium Fori revived in 1869?

And in answer to further questions, the Cardinal repeated what he had previously said as to the effect of concordats and of custom in abrogating the *Privilegium fori* in various countries, including Ireland. Then it was suggested by counsel that the enactment of the *Apostolicae Sedis* in 1869 did away with all these exceptions, and thus set up the *Privilegium* again. But the Cardinal explained that the enactment of that Constitution had no such effect :—

Mr. Purcell.—I find in the *Apostolicae Sedis* no limitation at all to the rule you have laid down?

His Eminence.—Well that does not interfere with *the concordats* or with *the practice* prevailing in the Church.

And again :—

Mr. Purcell.—Is there not at this moment an actual universal law of the Church that no layman shall bring a cleric before a lay tribunal?

His Eminence.—No.

Mr. Purcell.—Is not that laid down in the *Apostolicae Sedis*?

His Eminence.—Not universally, *it is nearly abrogated.*

Nothing, surely, could be plainer than all this. The Cardinal's evidence was distinct. Except as regards some very few countries,[1] the old *Privilegium fori* had gone, and the *Apostolicae Sedis* of 1869 had not revived it. If the *Apostolicae Sedis* had revived it, there would, of course, have been in existence, at the time of the O'Keeffe trial in Dublin, in 1873, "an actual universal law of the Church, that no layman shall bring a cleric before a lay tribunal." But, to the question whether any such law then existed, the Cardinal answered by an unqualified "No."

In view of all this, it may seem almost incredible that it should now be sought to set up,—and to set up on the basis of Cardinal Cullen's evidence as to the *Apostolicae Sedis*,—the grotesque theory that was propounded in letters published in several Dublin newspapers of the 3rd and 5th of January.[2]

A grotesque theory

The theory put forward in those letters is as follows:—

1. "*Up to the year* 1869, the *Privilegium fori* claimed by ecclesiastics had been abrogated in all countries where there were concordats, and had fallen into desuetude in most other countries; and the evidence of Cardinal Cullen quoted [by the Archbishop] went to prove this."

[1] See pages 61, 62.

[2] See the letters of Mr. F. W. Meredith in the *Daily Express* and other Dublin newspapers of the days mentioned.

2. "The Decree of 1869 *restored the privilege*,"—that is to say, the *Privilegium fori*.

3. "That *Cardinal Cullen was of opinion* that *the Decree of* 1869 was *binding in this country*, is manifest."

4. "*All the quotations from Cardinal Cullen's evidence* which Archbishop Walsh gives, except one which is immaterial, have reference, *not to the Decree of* 1869 at all, *but to the Canon Law which existed before that decree*, and to the Bull '*In Coena Domini*.'"[1]

Now, whatever else may be thought of these four statements, one thing is plain. They convey the idea that Cardinal Cullen's evidence as to the *Privilegium fori* being no longer in existence in Ireland, had reference, not to the year 1873, the year in which the evidence was given, but to a previous time,—the time preceding the enactment of the *Apostolicae Sedis*, in 1869, when, in Cardinal Cullen's opinion, as we are asked to believe, the *Privilegium fori*, was brought once more into operation in Ireland.

I feel assured that it is not meant by this to suggest that Cardinal Cullen stated in his evidence anything that he did not believe to be true. But two contradictory statements cannot both be true. I can only, then, come to the conclusion that the writer of those letters had not read the evidence of his Eminence,—or at least some

Contradictory statements

[1] The four passages here quoted are taken from the letters mentioned on the preceding page, footnote 2.

parts of it,—with the care with which that evidence ought to have been read before it was made the subject of a commentary to be sent out through the newspapers for the information of the public at large.

As to this, I need not go beyond one of the answers that I have transcribed a few pages back.[1] From those answers we can see that it is impossible to suppose that the Cardinal considered that the *Apostolicae Sedis* had revived the *Privilegium fori* :—

Mr. Purcell, Q.C.—Is there not *at this moment* an actual universal law of the Church that no layman shall bring a cleric before a lay tribunal?
His Eminence.—No.

Here, manifestly, there is question, not of the time preceding 1869, but of the 20th of May, 1873, and therefore of a time some years subsequent to that at which the Cardinal, we are told, considered that the *Privilegium fori* was revived by the enactment of the *Apostolicae Sedis*!

But there is something more than this.

With the view, apparently, of strengthening the impression that the Cardinal's evidence as to the abrogation of the *Privilegium fori* had reference only to the time before 1869, the following very peculiar statement has been made :—

All the quotations from Cardinal Cullen's evidence which

[1] See page 40.

An "immaterial" answer !

Archbishop Walsh gives, *except one which is immaterial*, have reference, *not to the Decree of* 1869 at all, but to *the Canon Law which existed before that decree*, and to the Bull "In Coena Domini."

In other words, Cardinal Cullen's evidence, in so far as it was material, was merely to the effect that the *Privilegium fori* had not been in operation,—and, apparently, had not been in operation for a considerable time,—previous to 1869, the year in which it was again revived by the enactment of the *Apostolicae Sedis*.

Now take the Cardinal's answer quoted on the preceding page. He was asked the question,—" Is there not AT THIS MOMENT an actual universal law of the Church, that no layman shall bring a cleric before a lay tribunal ? " And it was to that question that he gave the unqualified answer " No."

Here, surely, is a very distinct statement, referring, not to " the Canon Law which existed before the Decree of 1869," but to the Canon Law existing on the 20th of May, 1873,—the day on which that answer was given in court. This, surely, makes an end of the notion that in Cardinal Cullen's view the *Privilegium fori* had been revived in 1869. What, then, is meant by telling us that we are to overlook this vitally important answer as " immaterial " ?

Immaterial !

There is a point that should not be overlooked here. The writer of the letters from which I have taken the

four statements set forth above, not being a canonist, could not be expected to know that the question he has raised, as to whether the *Apostolicae Sedis* had the effect of reviving the *Privilegium fori*, was fully considered by the authors of the commentaries on the *Apostolicae Sedis* that were published in such numbers, especially in the years immediately following its publication.

It will suffice to quote here the answer given to that question by the most eminent of all those commentators, Mgr. (afterwards Cardinal) D'Annibale. He answered it unhesitatingly in the negative. It was, he said, "simply incredible" that so wise a Pontiff (Pius IX) could have intended to open up thus abruptly, and as it were by a passing word, so vast and so tangled a field of controversies and troubles.[1]

The commentators on the *Apostolicae Sedis* agreed that the *Privilegium fori* remained,—as it remains to the present day,—just as it had stood before that Constitution was issued, that is to say, that the *Privilegium*

[1] "Prorsus incredibile est Pontificem sapientissimum, amplissimam atque implexissimam controversiarum et molestiarum segetem, repente, et vix uno verbo, suscitare voluisse"—(*In Constitutionem* Apostolicae Sedis . . *Commentarii editi jussu Illmi. ac Revmi. Fr. Ægidii Mauri, O.P., Episcopi Reatini:* n. 65 (2).

The commentary, first published anonymously, was known, for the reason indicated in its title, as the *Commentarius Reatinus*. The eulogium pronounced upon it by Fr. Ballerini, no indulgent critic, is well known: "Quidquid de his [censuris in Constitutione *Apostolicae Sedis* recensitis] subjiciamus in Notis, noverit Lector id fere desumptum ex Commentariis quae plura jam doctorum virorum studiis prodierunt: quibus Opusculum Revmi. Reatinae Dioecesis Vicarii, D. Jos. D'Annibale, Interamnae, 1873, editum . . . *doctrinae copia et soliditate facile excellit.*"—(Gury, *Theol. Moral.*, vol. ii. n. 970, *nota*. Ed. Ballerin.)

was not brought again into force in any place in which, whether by a Concordat or by custom, it had previously been abrogated.

Another statement put forward in one of the letters to which I am referring in this section should be mentioned here. It refers to myself. It is as follows :—

A "generally accepted" view!

> The generally accepted view of his Grace's letter [of the 29th of December] appears to be that he wished to prove by quotation from Cardinal Cullen's evidence that neither the recent Decree "Motu Proprio" [*sic*] nor the Constitution "Apostolicae Sedis" issued in 1869, applied to this country.[1]

Now there is not, either in my letter of the 29th of December or in any other letter of mine, one word that could even suggest the idea that the *Apostolicae Sedis* is not binding, or that I regard it as not binding, in this country. There is, indeed, in my letter of the 29th of December,—the letter referred to,—a statement that the *Apostolicae Sedis* had no bearing upon any of the points that were before the Court of Queen's Bench in the O'Keeffe case of 1873. That, obviously, is a very different thing.

As to my considering that the *Apostolicae Sedis* does not apply to this country, I cannot conceive what

[1] See the letter of Mr. F. W. Meredith in the *Daily Express*, and other Dublin newspapers of January 3rd, 1912.

A threefold absurdity

could have led anyone to think me capable of entertaining so strange a notion. As to the further idea that I not only entertained it, but sought to prove it, and, above all, to prove it out of statements made by Cardinal Cullen, I fail to find words that would adequately characterise the absurdity of what is thus ascribed to me.

What, then, did Cardinal Cullen hold about the *Apostolicae Sedis?*

The Apostolicae Sedis binding in Ireland

First of all, he held that the *Apostolicae Sedis* was binding in Ireland. Father O'Keeffe had throughout maintained that it was not promulgated so as to be binding in this country. Promulgation in Rome, he said, was not sufficient. The Cardinal's view was, of course, the very opposite of this :—

The *Apostolicae Sedis* was handed to every bishop in the Vatican Council, and by that means it was made known all over the world. The Pope himself, who is the lawgiver, declares that when he publishes a bull at Rome, it is to bind everywhere. It is binding over all the Church.

I do not mean to say that everyone is to become acquainted with it all at once. The moment it becomes known over the Church it is binding, just as the penalty for any particular act by the Parliament of England will bind in Ireland as soon as the time for its promulgation arrives.[1]

[1] In the case of Father O'Keeffe, no excuse could be raised on the score of want of knowledge of the enactment. In his examination at

Secondly, the Cardinal explained that the *Apostolicae Sedis*, which was an authoritative catalogue of ecclesiastical censures, did not create any new canonical offence, but that, taking certain canonical offences, in other words, certain violations of the Canon Law, it assigned a suitable ecclesiastical penalty to each.[1]

An authoritative catalogue of censures

Thirdly, his Eminence pointed out that the *Apostolicae Sedis* in no way interfered with the freedom of a layman to take legal proceedings against anyone, lay or ecclesiastic, against whom he considered that he had a claim. And for this he gave the obvious reason that the provision of the Canon Law, the old *Privilegium fori*, —which had, as he said, "in the middle ages" prohibited the laity from suing the clergy in the secular courts,—was no longer in force in Ireland.

No restriction on the laity

Fourthly, he explained that ecclesiastics were prohibited from impleading other ecclesiastics in the civil

the trial, in reply to a question from the presiding Judge, he admitted without difficulty, but to the evident consternation of his counsel, that he had full knowledge of it. The following is an extract from the evidence :—

The Lord Chief Justice.—May I ask you had this last Bull ever been delivered to the bishop of your diocese, or was it ever, by the bishop or by any other person, delivered to you ?

Father O'Keeffe.—It was sent to me from Rome.

Chief Justice.—From Rome ?

Father O'Keeffe.—It was sent to me from Rome in answer to an application I made to Cardinal Barnabo.

[1] See page 7, footnote 2.

The clause "Cogentes" and the clergy

courts, but that this prohibition was quite independent of the *Privilegium fori*. He considered therefore that ecclesiastics who oblige lay Judges to bring ecclesiastics before their secular tribunals, act "*praeter canonicas dispositiones*," and thus come within the terms of the clause *Cogentes*. That clause, no doubt, makes no formal distinction between the clergy and the laity. But it makes a very real distinction. For it is operative only where there is a canonical offence,—an impleading of an ecclesiastic "*praeter canonicas dispositiones*,"—and there is such an offence in the one case, and not in the other.

Fifthly, the Cardinal took care to point out that all this had nothing to do with the case then before the court. The sentence which he had judicially pronounced on Father O'Keeffe was not a sentence declaring that Father O'Keeffe had incurred excommunication, —that being the only sentence that he could have pronounced if he were giving effect to the provisions of the *Apostolicae Sedis*. The sentence pronounced upon Father O'Keeffe for the canonical offence of impleading his Bishop, was a sentence, not of excommunication but of suspension, a censure of a wholly different nature.

The censure of the clause "Cogentes" not applied to Fr. O'Keeffe

Sixthly, the Cardinal was quite clear that Father O'Keeffe had incurred the penalty decreed by the *Apos-*

The censure incurred by Fr. O'Keeffe

tolicae Sedis.[1] "I think," said his Eminence, "his conduct was clearly within the terms of the *Apostolicae Sedis.*" And again:—"He sued his bishop for discharging his duty, for correcting and reprimanding him, and trying to put him in the right path; and, for having done so, he incurred the penalty of the Church. . . . He was answerable for what he had done in the sight of God; he was under excommunication. *It was an affair for his own conscience.*" But no sentence of excommunication was pronounced against him.

Finally, it is to be noted, that, although the Cardinal might have declared that Father O'Keeffe had incurred the excommunication, he was unwilling to have recourse to the severe measure of pronouncing a judicial sentence to that effect. In Canon Law, as he explained to the court, a declaratory sentence that excommunication has been incurred involves consequences of the most stringent severity.

The Cardinal himself of course had no doubt of the *Apostolicae Sedis* being in force in this country. But,

[1] An excommunication or other censure, *latae sententiae*,—such, for instance, as the excommunication decreed by the clause *Cogentes* of the *Apostolicae Sedis*,—is incurred *ipso facto*.

But, as may be seen from what is stated in the text above, there is something to be added. For, as Benedicti XIV. (De Syn. lib. 10, c. 1, n. 5) explains it,—

"Sententia declaratoria criminis utique necessaria est *pro foro externo*, in quo nemo est reputandus censura innodatus nisi legitime probetur reus criminis cui est censura jure ipso alligata. *In foro autem interno*, et coram Deo, cujus oculis omnia nuda sunt et aperta, ad incurrendum in censuram latae sententiae, nulla est necessaria Judicis declaratio, sed sat est crimen perpetrare cui illa est annexa. Suam quippe contumaciam et Ecclesiae contemptum satis aperte manifestat, qui in legem deliquit, quam scit in sui transgressores censurae vinculum statim et illico injicere."

he said, " I knew there were others who differed from me, and if he had a fair case to stand [on], I would not condemn him on that account. But I did not go on either the Bull or the new Constitution [that is, on the Bull *In Coena Domini*, or on the Constitution *Apostolicae Sedis*]." And again :— That the *Apostolicae Sedis* by promulgation binds the people of this country, and people all over the world, is my opinion. " I would act on it myself, but I would not enforce it *on those who say it has not been sufficiently promulgated in any place.*"

Cardinal Cullen's action misrepresented

It is to be regretted that in one of the letters already referred to in the course of this section, the Cardinal's explanation of his having contented himself with the far milder form of censure is misrepresented,—I feel assured, unintentionally.

We there read :—

It is manifest . . that *the sole ground* upon which the Cardinal decided that he would not act upon the decree was because *it had not been sufficiently promulgated* at the time.[1]

I have here to say that nothing but a very fragmentary reading of the Cardinal's voluminous evidence could account for such a statement being put forward in the face of his Eminence's explicit statements. Nothing could be more distinct than his evidence that the *Apostolicae Sedis* was sufficiently promulgated for

[1] See the letter of Mr. F. W. Meredith, in the *Daily Express* and other Dublin newspapers of January 3rd, 1912.

the Church at large by its being communicated to every bishop in the Vatican Council; that, by virtue of that promulgation, it became binding upon Catholics throughout the world as soon as they came to know of it; that, as was undeniable, and had, in fact, been admitted in evidence given by Father O'Keeffe himself in open court,[1] it had become known to Father O'Keeffe; that, consequently, in his Eminence's opinion, Father O'Keeffe incurred the excommunication; that, nevertheless, he considered he had sufficiently discharged his duty by calling Father O'Keeffe's attention to the matter, putting it to him, as a matter to be seriously reflected upon as one of conscientious obligation; but that, having thus left it to Father O'Keeffe himself as a matter of conscience,—there being other and sufficient grounds to go upon,—he abstained from the painful course of dealing judicially with that part of the case.

It is worthy of note that, in an important Decree, issued on the 17th of May, 1886, in reference to the case of a priest bringing before a lay tribunal, either an ecclesiastic without the leave of the Ordinary,[2] or a Bishop without the leave of the Holy See, the S. Congregation of Propaganda suggested to Bishops the adoption of the very course that was taken by Cardinal Cullen in the case of Father O'Keeffe.[3]

[1] See page 47, footnote 1.

[2] "Quod si venia conveniendi clericum in forum laicorum ab Ordinariis petatur, *ipsi numquam eam denegabunt*, tum maxime cum ipsi controversiis inter partes conciliandis frustra operam dederint.' *Decretum S. Cong. de Prop. Fide* (17 Maii, 1886).

[3] "Episcopi vero . . possunt in praedictum clericum animadvertere poenis et censuris *ferendae sententiae*, maxime *suspensione a divinis*, si id expedire in Domino judicaverint."—(*Ibid.*)

SECTION VI.

The Motu Proprio considered as an independent enactment.

So far, we have been considering the recent Motu Proprio as a decree authoritatively interpreting the clause *Cogentes* of the *Apostolicae Sedis*. But, as we have seen, it may also be viewed as an independent decree, supplementing the *Apostolicae Sedis* by a new enactment.[1]

It so happens that, considered in this second way, the Motu Proprio can be dealt with very briefly, and this for two reasons. First, not a few of the matters that enter into the consideration of this second aspect of the case have already been fully dealt with in the preceding pages. Secondly, and principally, because this second aspect of the case does not in itself need any very extended treatment.

Custom and Canon Law

We have seen that, in Canon Law, custom may prevail against a law in either of two ways.[2] It may hinder the law from coming into operation at all in a particular place. Or it may bring the obligation of a law in any place to an end, after the law has been in force there, and in force perhaps for a very considerable time.

[1] See pages 7, 8.

[2] See page 21, n. 8.

The Motu Proprio being of quite recent date, we have here to consider only the first of these two cases. As to this, then, the doctrine of the Canon Law as to the power of a general law to override a particular local custom, is, that no general law will override any such custom unless the legislator declares that he intends that the law shall do so.[1]

"Contrariis quibusvis non obstantibus"

But it may be asked, does not the Motu Proprio contain such a declaration? Does it not conclude with the words: "contrariis quibusvis non obstantibus"? And how can any custom interfere with the binding force of a decree containing words such as these?

To a person knowing nothing of the technicalities of law, this would naturally appear an insuperable difficulty. For it might well seem that in presence of such a clause, neither a contrary custom nor anything else could be of avail. Yet is it not matter of common knowledge, that an existing custom,—as we shall see more fully in the next section,—has been declared to be sufficient, both in Germany and in Belgium,[2] to hinder the application of the Motu Proprio to either of those countries? How, then, is this to be explained?

The explanation is very simple. As has been already indicated, it is a principle of the Canon Law that a general

[1] See, for instance, Reiffenstuel, In Lib. I Decret. tit. iv. § 8, n. 182; Santi, Ib. tit. iv. n. 21.

[2] See pages 57-61.

decree, such as that in question here, will not prevail over a local custom unless "custom" is mentioned. Words such as "contrariis quibusvis non obstantibus" will overcome other barriers, but not the barrier of custom.[1]

"Quacumque consuetudine non obstante"

It is not indeed necessary to mention in express terms the particular custom that is to be displaced. It would, as a rule, suffice to say, "*quacumque consuetudine* non obstante." Even this, however, would not suffice in the case of an immemorial custom. In such a case, an abrogating clause will not be effective unless to the words, "non obstante quacumque consuetudine" there are added the further words "etiam privilegiata," or "etiam immemoriali et privilegiata." And, of course, the same effect will be produced by a clause in which such customs are equivalently mentioned, as, for instance, "contrariis quibusvis, *etiam specialissima mentione dignis*, non obstantibus."

And all this is matter of ordinary practice. When a Papal decree, then, is intended to displace local customs, words such as those just now mentioned are inserted as a matter of course,[2] and they can be dispensed with only if the privileged custom is "reprobated," by

[1] "Consuetudo localis non censetur abrogata per legem generalem contrariam *nisi consuetudinis mentio fiat.*" Icard, *Praelectiones*, n. 20, 1°.

This is expressly enacted in the decretal *Licet* (Cap. 1, *De Consuet.* in 6°).

[2] See pages 95, 96.

the legislator, that is to say, if it is denounced by him as "irrationabilis," or as "corruptela," or "corruptela juris."[1]

So much, then, for the clause "omnibus quibusvis non obstantibus."

[1] Santi, *Praelectiones*, In lib. i. tit. iv. n. 21.

SECTION VII.

The Motu Proprio in Germany and in Belgium.

I may here once more direct attention to two of the sensational headings reproduced from the Dublin *Daily Express* on a former page.[1] They are these :—

ACTION BY GERMANY

CARDINAL YIELDS TO GERMAN GOVERNMENT.

These headings had reference to an incident, a very imperfect account of which had been telegraphed by the news agencies all over Europe, presumably indeed all over the world. What had thus been conveyed to the public was that, after the publication of the Motu Proprio, the Prussian Minister accredited to the Vatican, Herr von Mühlberg, was directed by his Government to ascertain from the Holy See if the decree extended to Germany; and that Cardinal Merry del Val, the Pope's Cardinal Secretary of State, replied that the Motu Proprio had no reference to that country.

Suppressio Veri again

If this was a fair account of what had occurred at the Vatican, it might perhaps be taken as justifying the headlines transcribed above: Germany,—a strong and high-spirited power that would not submit to the

[1] See pages 2 and 6.

rights of its subjects being invaded,—had taken action; and the Holy See, thus boldly confronted, had given way. But the story as told, so far from being a complete or fair account of what had taken place, was an altogether incomplete one, so incomplete indeed and misleading that it was felt at the Vatican that a correct statement of what had occurred should at once be officially published.

The whole truth

The following therefore appeared in the *Osservatore Romano* of the 16th of December. It was appended to the telegram which gave the misleading account of the incident :—

" In reference to this telegram we are authorised to state that, after the publication of the Motu Proprio, *Quantavis diligentia*, Herr von Mühlberg, the Minister accredited by Prussia to the Holy See, asked, as he was instructed to do by his Government, what view was taken by the Holy See of the article of Mgr. Heiner."[1]

Mgr. Heiner's article

The article of Mgr. Heiner referred to was that already mentioned, in which it was shown, from ordinary and well-known principles of Canon Law, that the recent decree could not have reference to Germany, inasmuch as the *Privilegium fori* no longer existed in that country, having long since been abrogated there by local custom.[2]

The official announcement, then, in the *Osservatore*

[1] *Osservatore Romano*, 16th December, 1911.
[2] See page 35, footnote 1.

Romano in reference to the interview between the Cardinal and the Minister continued as follows :—

"The Cardinal Secretary of State declared that the principles of Canon Law developed in the well-known article of Mgr. Heiner regarding the Motu Proprio *Quantavis diligentia*, and the abrogation of the *Privilegium fori* by contrary custom, are IN CONFORMITY WITH THE CANONICAL DOCTRINES OF THE CHURCH.

"CONSEQUENTLY the aforesaid Motu Proprio DOES NOT AFFECT GERMANY."[1]

So that, instead of the humiliating spectacle of the Pope's Cardinal Secretary of State "yielding" to the demands of the Minister of an imperious Government, we have an almost commonplace occurrence. The Prussian Minister asked what view was taken by the Holy See of the article in which Mgr. Heiner undertook to show that the Motu Proprio could not apply to Germany, inasmuch as the *Privilegium fori* no longer existed there, having been abrogated by a contrary custom. And, in reply, the Cardinal informed him that the explanation given by Mgr. Heiner is in conformity with the Canon Law, and that CONSEQUENTLY the decree does not apply to Germany.

Why the Motu Proprio does not apply to Germany

[1] "Il Cardinale Segretario di Stato dichiarò che i principii di diritto canonico svolti nel ben noto articolo da Mons. Heiner circa il Motu Proprio *Quantavis diligentia*, e circa la derogazione del *Privilegium fori* per diritto consuetudinario, sono CONFORMI ALLE DOTTRINE CANONICHE DELLA CHIESA.

"PER CONSEQUENZA, il Motu Proprio suddetto NON TOCCA LA GERMANIA"—(*Osservatore Romano*, 16th December, 1911).

That the declaration thus officially made in reference to Germany is equally applicable to every other country in which the circumstances are the same as in Germany,—that is to say, to every country in which the *Privilegium fori* has gone into desuetude,—can hardly need to be pointed out.

Germany and other countries

A case somewhat similar to that just now mentioned has occurred still more recently in reference to Belgium.

Belgium

A press-agency telegram dated Brussels, 17th January, 1912, was published in the Roman newspapers of the following day. It announced that "in reply to a question regarding the Pontifical Motu Proprio of the 19th of October, the Minister of Foreign Affairs said that the Cardinal Secretary of State has declared that the decree does not apply to Belgium."

Suppressio Veri again

Again there was need of a supplemental statement, and, in publishing the telegram, the *Osservatore Romano* added the following :—

"We do not know what words may have been used by the Minister in explaining more fully the laconic reply that has come to us by telegraph.

"For our part, we can state that the Canon Law itself establishes that a legitimate custom can derogate from the general law.

"Now his Eminence the Cardinal Archbishop of

Mechlin has declared that, as a matter of fact, such a custom exists in Belgium.

"HENCE IT IS EVIDENT that the principle already applied to Germany is APPLICABLE TO BELGIUM ALSO."[1]

Where can the Apostolicae Sedis and the Motu Proprio now bind?

But this suggests a further question. If we are to accept the explanation given in the preceding pages as to the effect of custom in limiting the range of application of Pontifical documents such as the *Apostolicae Sedis* and the recent Motu Proprio, how can there be any country in the world to which either of those important Papal documents is applicable?

The commentators on the *Apostolicae Sedis* had no difficulty in answering this question.

As regards the particular excommunication in question here, the *Apostolicae Sedis*, as they pointed out, re-affirmed the old enactment of the Bulla *Coenae*, but in a modified form, and for those countries only in which the *Privilegium fori*, or old immunity of the clergy from the jurisdiction of the secular courts, had neither been removed by concordat nor abrogated by a duly estab-

[1] "Non sappiamo quali siano state le parole del Ministro a maggiore spiegazione della laconica risposta communicataci per telegrafo.

"Per parte nostra possiamo affermare che lo stesso diritto Canonico stabilisce che una leggitima consuetudine può derogare dalla legge generale.

"Ora conforme ha dichiarato l'Eminentissimo Cardinale di Melines esiste veramente in Belgio tale consuetudine.

"QUINDI È EVIDENTE che il principio indicato per la Germania è PURE APPLICABILE AL BELGIO."—(*Osservatore Romano*, 18th January, 1912.)

lished custom. This practically limits the operation of the *Apostolicae Sedis*, in this respect, to Rome, with the States of the Church seized upon by the Italian Government, and, apparently, the rest of Italy, or the greater part of it.[1]

Rome and Italy

It may be asked whether this does not apply also to a country the government of which has expressly declared, or has shown by its acts, that it no longer intends to abide by the provisions of a concordat entered into with the Holy See.[2] If countries

Cases of broken faith

[1] "Romanus Pontifex excommunicationem hujusmodi innovavit anno 1869, non pro iis regnis in quibus de facto forum ecclesiasticum jam abrogatum reperiebatur, sed pro iis regnis, Italia praesertim, et provinciis Status Pontificii ab italico gubernio occupatis, in quibus, spreto quocumque Pontificio decreto, ecclesiastici ut laici quilibet tractabantur, ut post diem 20 Septembris, 1870, tractantur Romae."—Avanzini, App. VI. p. 263.

[2] The following extract from the report of the cross-examination of Cardinal Cullen in the O'Keeffe trial in Dublin, may be of interest here :—

Mr. Purcell, Q.C.—Of course it is optional at any time with the Holy See to withdraw the concordat ?

His Eminence.—No, there are two sides to the concordat; the king who makes it, the government which makes the concordat, and the Pope, they both have agreed, and one cannot withdraw without the other.

The Chief Justice.—The Cardinal is quite correct. The concordat is between two countries, two parties who agree.

Mr. Purcell.—The concordat is an agreement ?

His Eminence.—Of course it is an agreement binding the Pope and his successors, and binding the king, or prince, and his successors. It is like a regular treaty.

The Chief Justice.—Certainly, as long as it lasts.

His Eminence.—Until it is abrogated by just authority,—by the authority that made it.

The Chief Justice.—That is quite clear.

For an interesting explanation of the nature and binding authority of Concordats, see De Angelis, *Praelectiones*, vol. i. pages 93-119.

the governments of which have thus broken through the stipulations of concordats were again to become subject to the old discipline of the *Privilegium fori*, the field of application of the clause *Cogentes* of the *Apostolicae Sedis* would, no doubt, be notably widened.

The practice of the Holy See

But, outside certain exceptional cases, it is not the practice of the Holy See, to fail, on its part, to give effect to the provisions of a concordat, notwithstanding the breach of faith on the part of the State in refusing to observe them. The Holy See could, of course, in such circumstances, declare the concordat to be in no way binding upon it, but its practice is not to do so.[1]

[1] " In hisce rerum adjunctis, si quaeratur quodnam sit jus Ecclesiae, statim respondetur eam posse, vel insistere pro illorum observantia, vel ea *denuntiare*, ut aiunt, scilicet publice proclamare non amplius se velle respicere non adimpletos ex altera parte contractus.

" Nemo posset Ecclesiam reprehendere si unam aut alteram viam eligeret; ea enim est mutua sanctio pactorum, ut si una pars renuat ea observare, illa quae fideliter custodivit habeat contra primam duplex remedium, vel petendi recissionem contractus, vel instare pro ejus observantia.

" Ecclesia autem usque adhuc eam praxim secuta est, ut relicta denuntiatione Concordatorum, potius pro illorum observantia insisteret."—De Angelis, *Praelectiones*, vol. i. p. 112.

THE ROMAN ROTA AND ITS "AUDITORS" OR JUDGES.

The Roman Rota

THE Rota is a judicial tribunal of venerable antiquity. For centuries it had been one of the most dignified and respected tribunals in the world, frequently resorted to even by sovereigns, as a court of arbitration. Afterwards it fell into comparative obscurity, and for a time, indeed, it existed in little more than in name. This was its condition in 1908, when, as one of the reforms then effected by direction of the Holy Father in the Roman Curia, the Rota was reconstituted, and it became once more the supreme court of appeal from all the ecclesiastical courts, diocesan and provincial, throughout the Church.[1]

The Signatura Apostolica

There are, no doubt, certain specified cases in which a decision of the Rota may be brought before a higher tribunal, the "Signatura Apostolica,"—as, for instance, if, in the trial before the Rota, some essential rule of procedure has been violated.[2] But the Signatura—a tribunal which consists exclusively of Cardinals,—has to do only with the question whether the particular ground of objection relied upon has been made good or not. If

[1] Whilst the Rota is primarily a court of appeal, it can act also as a court of first instance, but only in cases remitted to it by the Pope.

[2] See *Acta Apostolicae Sedis*, vol. i. pag. 30.

it has been made good, then the case is sent back to the Rota, where it will be heard before a tribunal of three Judges other than those before whom it had at first been tried there.[1]

The "Auditors" of the Rota

The Judges of the Rota are now eleven in number, selected from various nations throughout the Church. Their official designation is "Auditors" of the Rota. Each case that comes before the Rota is heard and decided by a tribunal of three of these, except in cases of special importance, when, by direction of the Pope, the tribunal may consist of a larger number.[2]

Enough has now been said to make plain the importance of the judicial position occupied by Mgr. Heiner as an Auditor of the Rota, and his competence to pronounce as a canonist of eminence as to the conditions under which a canonical decree is, or is not, applicable to a particular country.

[1] An interesting feature of the procedure of the Rota is that the decision must, *sub poena nullitatis*, contain a statement of the grounds, whether as to the law or as to the facts of the case, upon which the decision is based.

Even when a decision is given only by a majority of the Judges, no indication is given of there being any difference of opinion amongst them. The decision is signed by the three, or by whatever other number constitute the tribunal in the case.

[2] From what has already been said, it is plain that there can be no appeal from the Rota to any other court. But a litigant in whose case an adverse decision has been given in the Rota, may appeal to the Rota itself, when his case will be heard by another tribunal, that is to say, by three Auditors other than those by whom it was first tried. And there may even be a further appeal which will be heard by another tribunal of three.

But, in normal cases, no decision of the Rota confirming a previous decision—whether of the Rota itself, or of a diocesan or other tribunal from which an appeal has been brought,—can be appealed from.

THE MOTU PROPRIO "QUANTAVIS DILIGENTIA" OF THE 9th OCTOBER, 1911.

[An article contributed to the *Kölnische Volkszeitung* of the 27th of November, 1911, by Mgr. Dr. F. Heiner, Auditor of the Roman Rota.]

(*Translated from the German.*[1])

The recent Motu Proprio and German Political Parties

As was to be foreseen, the recent decree of the Pope, defining the penalty to be incurred by Catholics who oblige a secular judge to summon ecclesiastics to appear in his court, has given fresh occasion to the Liberal press of Germany to indulge in violent attacks on the Holy See. Even at the Berlin meeting of the National Liberal party on the 19th of November, the Motu Proprio was put forward as a weapon to be used against the Church and against the Centre party. I have not as yet at hand the utterances in the press of the Evangelical Alliance, but that it also will avail itself of the Pope's decree to attack "Ultramontanism," is a matter of course.[2] To instruct and convert those born antagonists of Rome and of the Catholic Church is an impossibility, for, in their case, the very first condition of conversion, a good will, is altogether wanting.

But even some who usually are not ill-disposed towards the Church, and even some Catholics, have taken

[1] Some footnotes, printed within brackets, have been added by way of explanation or illustration.

[2] [It has, adds Dr. Heiner in parenthesis, already done so.]

offence at the decree because they give to it a meaning and a range of application wider than it really has. It is from this point of view that the article in the *Kölnische Zeitung* of November 16th, "The Pope *versus* the Constitutional State," was written by its Roman correspondent, although indeed he seems to have endeavoured to write calmly and without prejudice. But we may well apply to him the words which in his article he himself applies to the Pope: "the intention is good, but there is a want of knowledge." It is from a want of knowledge of the true meaning and bearing of the Motu Proprio, and of the history and purport of the *Privilegium fori,* that those writers have given to the recent decree a meaning and a range of application, which, in the case, in particular, of Germany and Austria, it does not possess.

The Privilegium Fori

As to the privileged position of the clergy before the law (*Privilegium fori*), it may be well to say some few words before proceeding to what we have to say about the Motu Proprio itself.

The privilege of the Clergy (*Privilegium fori*), that they should be judged by clergymen only, rests in principle on the admonition addressed by the Apostle St. Paul to the Christians of Corinth (1 Cor. vi. 1-8), in which he sternly rebukes them for bringing their disputes before the pagan courts. Such a practice, he tells them, could not but be a source of great scandal amongst the faithful, and could not fail to give the pagans grounds for despising the Christians as a mean-spirited and low-minded people who put temporal interests before all else. St. Paul, then, exhorts the Corinthians to settle their disputes among themselves by means of arbitration. It is, he tells them, a weakness, and even

a crime, that there should be so many disputes among them. From the very beginning, then, the Church had a horror of litigation among the faithful, and tried in every possible manner to turn them away from lawsuits.

This applied especially to the clergy, whose office it is to announce the message of peace, and who should therefore be kept aloof from places where selfishness, malice, and obstinacy so frequently embitter and alienate hearts. Naturally, then, it was regarded as an attack on the Church, in its very essence and spirit, when ecclesiastics were compelled to appear before the public tribunals.

The view thus taken by the Church was derived, not alone from the text of St. Paul quoted above, but also from the precept of our Lord: If thy brother offend against thee, rebuke him between thyself and him alone; if this should fail, rebuke him before witnesses. If he should still continue obstinate, he was to be denounced to the Church, that the Church might judge him. If the rule thus laid down held good for all Christians, how much more strongly did it apply to the clergy. And so it was forbidden, and forbidden under penalty, to summon an ecclesiastic before the secular judge.

The Privilegium Fori and the Roman Civil Law

The view of the matter thus inspired by the teaching of Christ and of the Apostles, was adopted by the first Christian emperors, and found its place as a legal doctrine in the text-books of secular law. Thus it happened that the doctrine of the *Privilegium fori* passed into the judicial system of the West,[1] and con-

[1] [Amongst the passages commonly quoted from the *Corpus Juris Civilis* in reference to the *Privilegium fori*, is the *Authentica* "Statuimus," which occurs in the 3d Title of the 1st Book of the Code:—

"Statuimus ut nullus ecclesiasticam personam in criminali

tinued to be recognised, until, after it had been in existence for fifteen hundred years, it was undermined and finally done away with by the absolutism of the modern constitutional state. But, side by side with all this, the system of separate courts for the military, plainly at variance though that system is with the doctrine of "equality before the law,"—the doctrine now so freely invoked against the clergy,—is maintained to the present day.[1]

Writing in a newspaper such as this, we cannot go more fully into the consideration of the grounds of the privilege of the clergy in reference to the secular courts; but no one who considers the matter from the point of view of Christian faith, no unprejudiced person who reflects upon it, can fail to appreciate the standpoint from which, as a matter of principle, the Church has always regarded that privilege, and still regards it.

The Privilegium Fori in practice

But as to the practical application of the principle, circumstances have to be taken account of. And so, wherever it has been found that, in any country, the feelings of the community at large in reference to religion and the clergy had changed, and that the clergy, so far from being held in the same respect as formerly, were subjected to restraints which excluded them from various spheres of efficiency and usefulness,—

quaestione vel civili trahere ad judicium saeculare praesumat contra constitutiones imperiales et canonicas sanctiones.

"Quod si actor fecerit, a suo jure cadat, judicatum non teneat, et judex ex tunc potestate judicandi privetur."—(Lib. 1. t. 3, *De Episcopis et Clericis*, etc., Auth. "Statuimus."]

[1] [The reference here, of course, is to the system of military law that apparently is maintained in Germany and in several other European countries, in which soldiers are subject to the jurisdiction only of the military courts, even when the offence to be dealt with is not of a military character.]

in a word, when the grounds of the special privilege of the clergy no longer held good,—the Popes have never hesitated to exercise in the amplest manner their supreme ecclesiastical authority by granting concessions to governments when they represented that, for the reason mentioned above, they were not in a position to uphold the Privilege. This occurred in France, Austria, Bavaria, and other countries.

Moreover, even in cases in which a State, taking the matter into its own hands, had deprived the Church of this right,—acquired though it was by law, and sanctioned by custom,—the Holy See has either submitted silently to what was done, or, at most, has protested against it, as an assertion of principle, but has never placed any practical difficulty in the way of any government in this matter. If, in the circumstances of the time, the abolition of the *Privilegium fori* will serve the interest of any State,—or if the government of a State believes this to be the case,—and if there be no reason to apprehend that the abolition of the Privilege will be made use of to degrade the clergy, or curtail their influence in the work of their spiritual ministry, the Church is far from setting such store by the Privilege as to refrain from granting to the civil power the most ample concessions, or at all events tolerating[1] the new state of things that has been introduced.

But, on the other hand, when a State sets aside,—as

[1] [The use of the word "tolerate" in reference to the action of the Church in matters such as that which we are here considering, sometimes gives rise to misconception.

The word does not, as is frequently supposed, imply anything in the nature of hostility to the arrangement which is said to be "tolerated." What is meant is, that, whilst there is in the arrangement in question some drawback that hinders it from receiving the positive approval of the Church, there is, at the same time, nothing to interfere with its being acted upon in practice.]

Italy is doing at present,—all considerations of history, of custom, of fairness, and of justice,—when it makes no account of sacred rights justly acquired, and when, in the self-consciousness of its arbitrary power, it disregards and ignores the highest representative of those rights of the Church, and enacts laws openly hostile to it,—when it leaves even cardinals and bishops without protection against anti-clerical and other hostile tendencies,—the Church cannot be blamed when it stands forth to protect its servants and to safeguard their rights.

The case of Italy

As to Italy, no one who knows the state of affairs in that country can fail to understand the meaning of the Motu Proprio. But it is hard to comprehend why those countries to which this decree has no reference should get excited over it. In this we refer especially to Germany and Austria, both of these being countries to which the decree in no way applies.

Austria stands entirely apart. In that country, no question of a violation of the *Privilegium fori* can arise, because the *Privilegium* was abrogated by the Concordat of August 18th, 1855, in the 13th and 14th articles of which it is expressly laid down that both in purely civil and in criminal cases the clergy shall be subject to the jurisdiction of the lay courts. No one, therefore, who summons a clergyman before a secular court in that country, encroaches on the *Privilegium*, or incurs the penalty proclaimed in the Motu Proprio.

Concordats

Again, the Bavarian Concordats of 1st April, 1818, and of 23rd September, 1821, are to the same effect with respect to civil cases.

In the remaining parts of Germany also, the

Privilegium fori is abrogated, not, indeed, by formal Concordats between Church and State, but by the force of contrary custom.

That a custom can have the effect of abolishing a privilege such as this,—although some canonists have denied it,—admits of no doubt whatever.[1] Thus Santi writes :—

> Ob urgentes circumstantias, ob specialem conditionem locorum et temporum potest Romanus Pontifex vel tolerare vel etiam permittere ut causae clericorum a laicis personis, quibusdam in locis et certis sub conditionibus, cognoscantur et definiantur.[2]

And Father Wernz, now General of the Jesuits, has the following :—

> Consuetudo, cum vi juris divini abrogandi prorsus destituatur, *forum privilegiatum Romani Pontificis* nullo unquam tempore auferre valet; at *immunitas inferiorum clericorum*, quo ambitu, *expressa Romani Pontificis concessione*, in multis regionibus immutata vel quoad substantiam abrogata est, eodem etiam, *longaeva consuetudine*, in aliis regionibus immutari vel tolli potest.
>
> Quod enim, temporum ratione habita, Romanus Pontifex non paucis regionibus concessit, profecto *nequit esse praxis irrationabilis*, licet sit minus perfecta et favorabilis Ecclesiae; at etiam in aliis regionibus eaedem possunt vigere circumstantiae, ergo rationabilitas, sive prima legitimae consuetudinis conditio, non deest.
>
> Qua conditione posita, multo facilius habetur altera, quod consuetudo debeat esse legitime praescripta.[3]

Here, then, Wernz expressly teaches the possibility of the formation, or of the preservation, of a lawful right established by custom in this matter.

[1] See page 59.

[2] Santi (Leitner), *Praelectiones Juris Canonici*, Lib. 2. p. 26 (Ed. 4).

[3] Wernz, *Praelectiones De Judiciis Civilibus*, Romae, 1889, pag. 260.

As for myself, in my treatise on Canon Law,[1] I wrote as follows :—

Mgr. Heiner's treatise on Canon Law

"Meanwhile, the modern legislation of most countries has deprived ecclesiastics of the Privilege, so that at present the clergy are left subject exclusively to the episcopal *forum* only in matters that appertain to their priestly office and duties; and indeed, even as regards these, there exist in some few countries unjust limitations imposed by the civil government. On the other hand, as to civil actions, and as to offences of the clergy in civil matters, the secular courts consider that with these, they alone are competent to deal. To these limitations of the *Privilegium fori*, the Holy See, taking into consideration the circumstances of the times, has given its full consent, either expressly, as in the more recent concordats, or tacitly, inasmuch as, by an established custom to the contrary, the Privilegium is to be considered as abolished in all civil and criminal cases."

"Praeter canonicas dispositiones"

It has to be borne in mind that, if Pius IX, in the Bull *Apostolicae Sedis* of the 12th of August, 1869, pronounced an excommunication against those who compel lay judges to bring clergymen before their court, the words are expressly added, "*praeter canonicas dispositiones*,"—that is to say, where they do this contrary to the provisions of the canons.[2] Consequently, where a clergyman is summoned by a secular judge to appear before a secular court, if he is not summoned there *praeter canonicas dispositiones*,—that is to say, contrary to the provisions of the Canon Law,—there is no violation of the *Privilegium fori*, and thus the person

[1] Vol. i. p. 192, 5th ed.

[2] [See pages 36, 37.]

who compels a judge to summon an ecclesiastic before him in such a case cannot become liable to the penalty in question.

Thus a clergyman may be summoned to appear in a secular court without any detriment whatever to the rights of the Church in any place in which the *Privilegium fori* no longer applies,—that privilege having been abolished by the Holy See, either expressly by a Concordat, or tacitly, by the canonical effect of custom.

That these exceptions have not been withdrawn by the Motu Proprio of the 9th of October, 1911, is obvious. The Motu Proprio is not a new law. It is an authoritative statement of an old law, namely, of the clause "*Cogentes*" of the Bull *Apostolicae Sedis* of 1869.[1]

"Contrariis quibusvis non obstantibus"

As to the abrogatory clause at the end of the Motu Proprio—"*Quod autem his litteris sancitum est, firmum ratumque esse volumus, contrariis quibusvis non obstantibus,*"—that clause does not change the matter in any way, because a general law does not abolish a particular right unless that right is expressly mentioned.[2]

The Motu Proprio itself

But let us now look into the words of the Motu Proprio itself:—

"Whatever care may be taken in the framing of laws, it is frequently impossible to shut out all room for doubts that may be raised by plausible interpretations. It sometimes happens, indeed, that amongst lawyers who have thoroughly investigated the meaning and the binding force of a law, there is such difference of opinion that, except by an authoritative declaration, it is impossible to determine with certainty what has been enacted.

[1] [See page 7.] [2] [See pages 54-56.]

" This, we have seen, was the case after the promulgation of the Constitution, *Apostolicae Sedis*, which reduced the number of censures *latae sententiae*. For, amongst the writers who published commentaries on that Constitution, it was discussed with warmth whether the word *Cogentes* in the seventh chapter of the Constitution refers to legislators and persons in public authority only, or also to those private individuals, who by having recourse to a secular judge, or taking an action in his court, oblige him to bring an ecclesiastic before the court.

" The meaning of this chapter has been explained more than once by the Congregation of the Holy Office. However, in these times of injustice, when ecclesiastical immunity is no longer taken account of, when it is seen that not only clerics and priests, but also bishops and even cardinals of the Holy Roman Church, are brought before secular courts, We surely are called upon to keep within the lines of duty, by the infliction of a severe penalty, those who are not deterred by the sinfulness of their sacrilegious deeds.

" We, therefore, by this Motu Proprio, enact and declare as follows: Every private individual, secular or ecclesiastic, man or woman, who, in any matter, civil or criminal, shall, without the permission of the ecclesiastical authority, summon to a lay tribunal any ecclesiastic, compelling him to appear there in public, incurs the sentence of excommunication *latae sententiae*, specially reserved to the Roman Pontiff.

" We decree that the law as declared by this letter shall stand good, everything to the contrary notwithstanding.

" Given at Rome, at St. Peter's, on the 9th of October, 1911, in the ninth year of Our Pontificate.

PIUS PP. X."

The one matter settled by this decree is the answer to be given to the question: Do those Catholics who, either by lodging a plaint, or by taking an action, compel a judge to summon an ecclesiastic to appear in a secular court, incur the sentence of excommunication decreed in the Bull *Apostolicae Sedis?*

A long-standing controversy settled

That legislators and persons in public authority are covered by the word "*cogentes*" has never been a subject of doubt. It is equally certain that Judges, as such, are not covered by it, because,—as the Holy Office has expressed it,—they are not "*cogentes*" but "*coacti*," inasmuch as they are ministers of law compelled by the law to act.[1] It was only with respect to "*denuntiantes*" that is to say, private plaintiffs or accusers, that there existed any doubt among the canonist commentators on the Bull *Apostolicae Sedis*. That doubt continued until the provision of the Bull was interpreted by the Holy Office in 1886, in the more lenient sense, namely, that such litigants were not to be taken as included in the "*cogentes*," and consequently were not liable to incur the sentence of excommunication. But it is now authoritatively decreed by the Motu Proprio that private individuals become subject to the penalty decreed in the *Apostolicae Sedis*, that is, that they are excommunicated *ipso facto*, if they bring an ecclesiastic into the secular court without the permission of the competent ecclesiastical authority.

"Cogentes"

A Catholic, then, who wishes to proceed against an ecclesiastic in a secular court has to obtain the permission of the bishop, or render himself liable to the penalty decreed by the Church to be incurred by the

[1] [The reference is to a well-known decree of the Holy Office, dated 15th of June, 1870.]

violation of the *Privilegium fori*.[1] But where that privilege no longer exists,—whether, as in Austria, by virtue of a Concordat, or, as in Germany, as the result of an established custom,—there cannot be question of any violation of the Privilege, and so the penalty of excommunication cannot be incurred.

A weighty declaration

I say all this openly, speaking not only as a canonist, but also as Auditor or Judge of the highest court of ecclesiastical law in Rome.[2] I say it without the slightest apprehension of a disavowal, and therefore I write this paper openly under my own name.

What, then, is the meaning of all this excitement about the Motu Proprio that has been got up in the non-Catholic press of Germany? One would think that the whole legal system of the country had been broken through; that the Church had made a daring inroad on the province of the State; that the State itself had been put in serious peril; and that diplomacy would have to make the most serious representations to the Vatican, and in the end come to an open rupture with it.

Friendly settlements of disputes

There are, indeed, some who go so far as to blame the Church for even exhorting the clergy to bring their disputes before the ecclesiastic authority with a view to a friendly settlement or for decision.

Our critics can see nothing but "arrogance" in bringing before the bishop differences between the clergy themselves. An exhortation to the clergy that they should do this, and so avoid giving disedification

[1] [That is to say, in countries in which the *Privilegium* has not been abrogated by Concordat or by custom.]

[2] [See pages 65, 66.]

to the faithful, is denounced as an "evasion" of the secular court, and even as a "contempt," for the law of the State, and a "violation" of that law. As if everyone was not at perfect liberty to have his civil or private disputes settled by arbitration of a third party!

If ever there was a case of manifest bad faith, we surely find it here. The keeping clear of lawsuits is of advantage to society, and is in harmony with the spirit of the law itself. What, we may ask, is the meaning of Courts of Arbitration,[1] of Justices of the Peace, and of the efforts made even by ordinary courts to effect reconciliations or settlements in civil disputes, in cases of private injuries, and the like, before recourse is had to a judicial proceeding properly so called? Does the good order or the intellectual culture of a State depend upon its having to its credit the greatest possible number of law suits, of disputes, and of convictions?

Manifest bad faith

That truly would be a peculiar idea of the object to be aimed at by the "modern constitutional State." Hitherto the very opposite view has commonly prevailed, namely, that the smaller the number of lawsuits carried on, and of the penalties inflicted in any country, the higher should the moral condition of the country be taken to be; and *vice versa*. But according to our opponents, it is an "evasion" of the secular court, and a "contempt" for the law of the State, and a "violation" of that law, if ecclesiastics are exhorted by their superiors in the Church, when they have any ground of complaint,—whether against one another,

A perverse view

[1] [The official arbitrator (*Schiedsrichter*) and the arbitration court (*Schiedsgericht*), play an important part in the administration of justice in Germany. From Mgr. Heiner's references to "Justices of the Peace" (*Friedensrichter*) it would seem that in Germany, these, to some extent, exercise somewhat similar functions. But I am unable to say whether this is so or not.]

or against any of the laity,—not to rush at once with their complaint into a court of law, but to bring it first before the bishop, so that the case may, if possible, be settled without a trial in the courts, and that a conflict disedifying to the people may thus be avoided.

Any secular court would surely rejoice when as few contentious matters as possible are submitted to its decision, and the State can have no reason to feel anything but grateful to those who settle their disputes without litigation. When there is question of a transgression of the law of the State that has to be punished by the law of the State, who imagines that any ecclesiastical authority in Germany will step into the place of the secular judge and attempt to withdraw the clergy from the secular jurisdiction?

Nor has this been altered in the least by the Motu Proprio of Pius X,—a decree that has been so widely misunderstood and so violently attacked in the Press hostile to the Church.

APPENDIX

(A.)

KEEPING UP THE SCARE: SOME TYPICAL CONTRIBUTIONS.

On an early page of this pamphlet I referred to the newspaper articles, the speeches, and the letters, by which it was sought for awhile to keep up the scare that was started by the *Daily Express* over the issuing of the Motu Proprio *Quantavis diligentia*.[1]

I append a few specimens of the contributions thus referred to :—

I.—From *The Globe*.[2]

"There is a very real distinction between a man's private and his official conscience. No one is obliged to become a judge, for example ; but having accepted judicial office with his eyes open, a man is under the duty of applying the law, or else of resigning his post. An individual, on the other hand, will, if he be a good Catholic, consult his spiritual adviser before going to law, and in Catholic countries the new Decree will place the clergy quite beyond the pale of lay tribunals . . .

"We are sure that Roman Catholics will recognise that a document which appears to menace the supremacy of the British Crown as the fountain of justice according to the system in force since the Reformation, cannot be passed over unnoticed or unopposed. . . .

"Let us assume that the Home Rule Bill is driven through the breach in the Constitution wall created by the Parliament Act, and that it becomes law without an appeal to arms,—both very wide assumptions. In the New Ireland a Catholic priest goes into a shop, orders some goods, and does not pay

[1] See page 4.

[2] Quoted in the Dublin *Daily Express* of December 26th, 1911.

for them. He cannot be sued without permission having first been obtained from his superiors. We do not suggest that, in such a case as this, permission would be refused, but we would insist that the necessity of obtaining such permission runs clean counter to British ideas of the equality of all men before the law.

"Moreover, two hands cannot wield one sceptre, and the suspicion of a dual control of the courts is bound to create a general sense of unrest in Ireland which would go far to make Home Rule a failure, even if it had all the merits which its supporters are bold enough to claim for it."

II.—From *The Belfast Newsletter*.[1]

"The Pope's Decree setting priests and all ecclesiastical persons above the law, is receiving in the English newspapers the attention which it deserves. . . .

"Suppose a priest assaults a Protestant in presence of a Roman Catholic policeman. The policeman will be excommunicated if he arrests or summons the priest. Or a priest delivers a seditious or inflammatory speech at a public meeting—and many priests have done so—the Attorney-General, Solicitor-General, or Crown Prosecutor, if a Roman Catholic, cannot proceed against him; no Roman Catholic can give evidence against him; and no Roman Catholic Judge can try him without incurring the penalty of excommunication,—which is the most awful that they can imagine. The decree puts an end to the equality of all persons before the law, and to the impartial administration of justice. . . .

"It may be said that all that would happen in this case would be that the Roman Catholic Attorney-General or other State officer would resign as soon as he found that he could not conscientiously discharge his duty, and that the prosecution would be conducted by his successor. But he might do nothing of the kind. The priests might advise him that he would serve the interests of his Church best by remaining in office (!), and in any case the public could have no confidence that he would do his duty.

"Priests would be able to commit with impunity offences for which all others would be made amenable."

[1] Quoted in the Dublin *Daily Express* of December 30th, 1911.

III.—From *The Liverpool Courier* of January 2nd, 1912.

"Archbishop Walsh has come forward with a *causerie* upon the Decree. He does not attempt to explain it away. He says it is interpretative, but that it extends the application of the Bull of 1869, which penalises certain persons who in certain circumstances bring ecclesiastics before lay tribunals, even to the case of private individuals who take that course. There is surely not much comfort in that; on the contrary, it is really the confirmation of what everyone feared.

"The only point remaining is whether the Decree refers to Ireland, and on this the Archbishop succeeds in being seriously significant, and at the same time deliciously inconsequent. He adds a postscript to his letter in which he says his opinion is not worth the paper it is written on (!): it bears the same relation to a Papal pronouncement that counsel's opinion does to a House of Lords judgment[1] . . . He confesses in his naive postscript the worthlessness of his opinion."

IV.—From *The Methodist Times* of January 4th, 1912.

"We called attention last week to the publication in Ireland of an English translation of what is known as the Papal 'Motu Proprio,' placing ecclesiastics above the law of the land.

"This act is so exquisitely ill-timed that it looks as if the Pope, or his advisers, intended to deal a shrewd blow at the prospects of Home Rule. . . .

"At the same time, the matter is too serious to be allowed to rest where it stands at present. Mr. Redmond, whose recent accident we greatly regret, and his friends must take action if they are to command the whole-hearted support of Protestant Nonconformists. In Germany and Austria outbursts have taken place which have led the hierarchy to declare that this Decree does not apply to either of these countries.[2] The Irish leaders must (*sic*) offer an equally strong and successful opposition to the arrogance and folly of the Papal Court (!)"

[1] So that an opinion of counsel, inasmuch as it is not a judgment of the House of Lords, is "not worth the paper it is written on"!

[2] Of course this account of the exemption of Germany and Austria is grossly incorrect. See pages 57 5[illegible], and Mgr. Heiner's three papers reprinted in this pamphlet.

V.—Speech of the Right Hon. J. H. Campbell, K.C.

Speaking at what was described, no doubt correctly, by the *Daily Express* as a "rousing meeting," held in the Antient Concert Rooms, Dublin, on the 4th of January, Mr. Campbell explained the effect of the Motu Proprio as follows :—

"The effect of the Decree was to prevent any public official from bringing into a court of justice, criminal or civil, any ecclesiastic of the Roman Catholic Church.

"The law officers of to-day in Ireland were two very able and high-minded gentlemen. Both of them were members of the Roman Catholic Church, but if they were called upon in the exercise of their duty to their Sovereign to put the law in force against Roman Catholic priests, and if they did so, then, *ipso facto*, they incurred excommunication, one of the most serious penalties that any honest, conscientious Roman Catholic could incur.

"Not only that, but in the courts of Justice from week to week priests were constantly being impleaded in connection with will cases. They made wills. They were constantly interfering in the disposition of men's property, and some of those wills were disputed, and under many of them Protestants were beneficiaries or legatees; and if this Decree were to remain in force, none of those cases could be investigated in a court of justice."

VI.—Letter of Mr. Thos. Harrison, LL.B.

Under the somewhat misleading heading, "The Decree in Operation,"[1] the following letter appeared in the *Daily Express* of the 22nd of December, the day after the publication of the Motu Proprio in that paper :—

"The Decree in Operation.

"*To the Editor of the 'Daily Express.'*

"Sir,

"Not within the last three hundred years has there been published a 'Papal Decree' so far-reaching in its effects

See page 6.

upon civil life or so fatal to personal liberty as that promulgated by the Apostolic See on the 9th October, 1911, and which now lies before the public.

"It strikes at the root of all civil government in every civilised country under the sun. If it is obeyed, the law of the State and the protection which every subject of every civilised country is entitled to claim, becomes absolutely worthless.

"At present the State is supposed to be supreme. Every man is entitled to claim redress, as his right, against the highest in the land—except the King—for any wrong, civil or criminal. In future, no Roman Catholic, except upon pain of excommunication, can obtain redress for any wrong whether civil or criminal, against any priest, however humble, unless he first obtain the consent of the bishop to take proceedings. This new Decree is not confined to 'actions' or 'claims' or 'prosecutions' against a priest. It extends to every 'summons' to a priest, to appear before a Civil Court in any matter, civil or criminal.

"Let us see how this will work out in practice :—

"1. A Roman Catholic priest has seriously assaulted one of his parishioners. The latter cannot bring any action, civil or criminal, until he first obtains the permission of his bishop, and if he claims redress without such permission he is liable to excommunication.

"2. A testator bequeathes all his property to the bishop personally, or to the Roman Catholic Church, and leaves his wife and children destitute. The will is made *in extremis*, and under circumstances which would justify the next-of-kin striving to have the will set aside. One of the witnesses, or the executor, is a Roman Catholic priest. No Roman Catholic can take proceedings to have this will set aside until he first obtains the sanction of the bishop who either personally or as trustee for his Church may be the only person who takes benefit under the will.

"3. 'A' makes an ordinary will, to which a priest is witness, or of which he is an executor. It requires to be proved. Neither as witness nor as executor can the priest be 'summoned' to give evidence, by a Catholic Roman solicitor or client, without the 'permission' of the bishop

being first obtained,—except under the dreadful penalty of excommunication.

"4. A priest refuses to pay his lawful debts to one of his parishioners,—he cannot be sued or summoned to appear before a civil tribunal unless the permission of the bishop is first obtained—under penalty of the excommunication of the creditor or solicitor.

"5. 'A' is indicted for murder or robbery. 'B,' a Catholic priest, is the only witness. 'C,' a Roman Catholic Attorney-General or Solicitor-General, prosecutes. The latter cannot 'summon' the priest to give evidence, under pain of excommunication, unless he first obtains the leave of his bishop to 'summon' the only witness to the crime.

"Why, sir, one stands aghast at the paralysis of government, or the total effacement of civil liberty in Ireland, which must follow obedience to this Decree.

"Surely one may ask if this Decree were intended to stab Home Rule in its most vital part at this its most critical juncture. Was it promulgated to show to the world that though Home Rule is nominally 'demanded' by the Irish Party, it is the very last thing in the world that intelligent Roman Catholics really want.—Yours very truly,

"THOMAS HARRISON.

"65 FITZWILLIAM SQUARE, DUBLIN,
"*21st December*, 1911."

(B.)

MGR. HEINER'S REPLY TO THE CRITICS OF HIS ARTICLE IN THE "KÖLNISCHE VOLKSZEITUNG."[1]

In my article in the *Kölnische Volkszeitung* of the 27th of November, I wrote: "To instruct and convert those born antagonists of Rome and of the Catholic Church is an impossibility, for in their case the very first condition of conversion, a good will, is altogether wanting." This, as was to be expected, has been once more verified with regard to my explanation of the recent Motu Proprio. Clear though my demonstration must have been to every unprejudiced reader, fully fifty extracts from the journals of our opponents have reached me, in which, with desperate energy, but frequently on ridiculous grounds, they persist in maintaining that the Motu Proprio applies to Germany.

A forecast verified

The purpose of their discreditable tactics is evident at a glance. "Anti-Ultramontanism" is determined not to allow itself to be baulked of the welcome opportunity of making the most of the Motu Proprio against Rome, against Catholicism, and against the Centre party. All our antagonists throw themselves upon it as upon some carrion prey, and woe to him who attempts to disturb them in their repast. I especially have had personal experience of this, because I have had the courage or the "audacity" to sign with my own name my article in the *Kölnische Volkszeitung*. They even attack me personally, saying, for instance, that I do not know Latin, and, to make good their case, they make use even of printer's errors! Again, because I translated the words of the Motu Proprio "in hac temporum iniquitate" by "in these times of injustice," I am accused of being guilty of a "mystification" or of a "falsification" of the Motu Proprio, on the ground that *iniquitas* has in philosophical language a milder sense than "injustice," as may be seen in any Latin lexicon. Now I purposely translated "iniquitas"

Personal attacks

[1] (Translated from the *Kölnische Volkszeitung* of December 10th, 1911.)

by "injustice," a meaning which the word even now bears in the language of the Canon Law. But we need not dwell upon this.

An alleged contradiction

I have also been found fault with by my opponents on the ground that my explanation of the Motu Proprio is in contradiction with my own Manual on the Canon Law. The authors of those criticisms have either not read pages 192 and 193 of my Manual (5th Edition), or they have not understood what I have written there,—probably indeed they did not wish to understand it. Yet it is all so plain, that, except through ignorance or bad faith, no one could allege that my recent explanation of the *Privilegium fori* is in any way at variance with it.

On page 192, under n. 2, I wrote as follows: "As to civil actions and as to offences of the clergy in civil matters, the secular courts consider that with these, they alone are competent to deal. To these limitations of the *Privilegium fori* the Holy See, taking into consideration the circumstances of the times, has given its full consent, either expressly, as in the more recent Concordats, or tacitly, inasmuch as, by reason of an established custom to the contrary, the *Privilegium* is to be considered as abolished in all civil and criminal cases." On page 193, No. 3, where there is question of the principle in view of which the Church regards the *Privilegium fori*, the following passage occurs: "Apart from the fact that (the *Privilegium fori*), in all purely ecclesiastical affairs, especially concerning the ecclesiastical duties and offices of the Clergy, can and must be maintained,—because in these matters the secular courts possess no competency whatever, and in fact do not claim it,—the Church even now maintains the right of citing her servants before her own forum in temporal affairs, where there is no juridical provision to the contrary."

In accord with this I wrote, as far back as 1884, in my work on "Ecclesiastical Censures" (page 94), as follows:

Canonical exceptions to the Privilegium

"There may, therefore, exist cases in which there is no violation of the law of the Church in bringing an ecclesiastic for judgment before a lay tribunal. Such a judgment pronounced on a clergyman would not be contrary to the

provisions of the Canon Law in the following cases :—

"1. If such a judgment has been permitted to the civil authority by a Concordat with the Holy See.

"2. If the ecclesiastic has been justly degraded and delivered to the secular arm for punishment, because such a person no longer enjoys the *Privilegium fori.*

"3. If there is question of a country where the *Privilegium fori* may be regarded as abolished with the tacit assent of the Holy See by virtue of a duly established contrary custom ; for, as we read in the Commentary on the Bull *Apostolicae Sedis,* published by command of the Bishop of Reate : 'prorsus incredibile est Pontificem sapientissimum, amplissimam atque implexissimam controversiarum et molestiarum segetem, repente et vix uno verbo suscitare voluisse. Nec audiendi sunt, qui docent immunitatem ecclesiasticam divini iuris esse, cui abrogari non potest ; non enim de immunitate agimus, sed de censuris, quae iure, procul dubio, canonico sancitae sunt.' This opinion acquires additional strength from the fact that in the *Apostolicae Sedis,* above referred to, the special abrogation clauses of the Bulla *Coenae* with respect to customs and privileges were not retained."[1]

"Wholly incredible"

Here then we have even an Italian canonist[2] and a bishop holding that in this matter a right may be established by custom ; and declaring that those who assert the contrary should not be listened to.

The same view was held by my own teacher, Santi, who, both in his public teaching as professor, and in his Manual of Canon Law, set forth the same doctrine ; and it was also taught by Wernz while he was still professor at the Papal University in Rome. I may mention also the Jesuit Lehmkuhl, who, in his great work on Moral Theology, already in its twelfth edition, does not deny the possibility of a right established by custom. (See Lehmkuhl, vol. ii., page 686.)

[1] [Personally, I am not quite clear as to this. But the matter is no consequence whatever in the case. And, of course, I should be unwilling, without an opportunity of further investigating the matter, to express any doubt as to the accuracy of a statement made by a canonist of Mgr. Heiner's eminence.]

[2] [See page 45, footnote 1.]

All the above-mentioned works have been published with ecclesiastical approbation, and Rome has never in any way whatever found fault with them. In past times, as well as recently, I have conversed on this subject with various canonists of note, and also with colleagues of mine on the Roman Rota, all of whom agreed with me in opinion.

It is asked why the Motu Proprio does not express its meaning with greater clearness. I deny emphatically that the Motu Proprio is wanting in clearness. When I read it for the time I had not the slightest doubt either as to its meaning or as to the range of its application. It is not the business of the legislator to give further explanations about a law already clearly expressed; to give such explanations is the province rather of jurists.

Legislators and jurists

If reasonable doubts remain, Rome can always be applied to for further explanations, which, if given, become binding on Catholics. If Rome is unwilling to give an authoritative explanation,—and this is the case especially when the matter is clear in itself,—the answer generally given is that the approved authors should be consulted and followed. Moreover, in our present case, the fundamental principle applies, that *in odiosis*,—and so, whenever there is question of penalties,—the more lenient view is to be followed. But let us return to the main point.

When all the arguments brought forward in hostile journals against my article in the *Kölnische Volkszeitung* failed to produce any effect, the ingenious correspondent of the *Tägliche Rundschau*, Herr A. V. Müller, comes forward with a discovery by which he thinks he has completely beaten out of the field both myself and the *Kölnische Volkszeitung*. As a matter of course, other Liberal journals have not left this discovery unnoticed, and have speedily made it their own.

A discovery!

The point in question is a decision of the Roman Rota of the 15th of March, 1910, in which, in support of the judgment pronounced by the tribunal [insisting upon the maintenance of the *Privilegium fori* in the case before the court], the following statement is made: "Neque contrariam con-

suetudinem posse introduci ; ea enim reprobanda esset veluti corruptela juris, utpote adversa libertati Ecclesiasticae."

Herr Müller then triumphantly exclaims, " Thus Heiner and the *Kölnische Volkszeitung* are finally disposed of by the solemn statement of the canonical grounds of a decision of the Rota."

But the matter is not quite so simple as Herr Müller thinks. As yet we are far from being put out of court.

Importan distinctions

First, in what he has brought forward, there is question only of the grounds of a decision, and these can neither create nor define any right. Again, as to the decision itself : decisions define the rights of those only in respect of whom the decisions are given, and are binding upon them alone, whilst for other persons who are not specially referred to in the decision of the individual case, although they may happen to be in the same or in similar conditions, nothing is decided either to their advantage or to their disadvantage. That is a fundamental principle of law : " res inter alios acta nobis neque prodesse neque nocere potest." The decision referred to, then, can by no means be put forward as a proof that in the matter of the *Privilegium fori* a canonical right cannot be established by custom.

The case, as Dr. Wynen in the *Archiv. für katholisches Kirchenrecht* (vol. 91, page 53) has briefly, but correctly, stated it, was as follows :—

A case before the ecclesiastical courts in Rome

" A layman, for a sum of money due to him, summoned a priest before the Ecclesiastical Court of the Roman Vicariate. The priest objected to this procedure on the ground that it put his opponent in a more favourable condition than himself, inasmuch as, in the existing condition of affairs, his opponent would have free access to the secular courts in case the sentence pronounced by the ecclesiastical court should prove unfavourable, whereas he, the priest, had no such course open to him. He claimed, then, that the matter should be left to be dealt with in the secular court.

A specious plea

The application thus made was rejected by the Vicariate,

and this decision was brought by the priest before the Rota on appeal.[1] The Rota ruled in the first place that any disadvantages proceeding from laws should be taken into account by the legislator, but that a judge was bound to base his decisions simply on the law as it stood. The question of the *Privilegium fori* was then gone into in detail, and the well known principles which the Church immovably upholds were clearly set forth. But as nothing new was said, and as the Privilege in question is of little practical concern for Germany, we need not dwell further upon the subject.

Unforeseen developments

If Dr. Wynen could have foreseen that within a year the *Privilegium fori* would be one of the most prominent subjects of discussion in Germany, and that the above-mentioned decision of the Roman Rota would be brought forward in proof of the impossibility of the *Privilegium* being abrogated in Germany by reason of a contrary custom, he certainly would have explained the judgment of the Rota more fully. But that he regards the decision as being of no practical interest for Germany is clearly shown in his closing words: "as the Privilege in question is of little practical concern for Germany," etc. The three Judges also who gave judgment in the case would probably have expressed themselves in less general terms and in fuller detail, if they had foreseen that their application of the *Privilegium fori* to the case before them, which had reference only to Rome and to the conditions of affairs in Italy, could have given

[1] [Dr. Wynen's summary statement of the facts of the case in its progress through the courts may perhaps usefully be supplemented here.

The application of the priest, a Canon Baglioni, to have the case withdrawn from the ecclesiastical tribunal, was at first, strange to say, granted by the Vicariate, the court of first instance. Against this decision, the layman, a Signor Antonio Boni, appealed to the Rota. Before, however, the matter came on for hearing by the Rota, an agreement was come to between the parties, by virtue of which the case was brought back to the Vicariate, and was thus put once more in the position from which it had started.

On a fuller consideration of the matter, the Vicariate refused to allow the case to be removed from the ecclesiastical jurisdiction, thus deciding against the priest and in favour of the layman. Against this decision the priest appealed, and thus the case came before the Rota for final decision as mentioned by Dr. Wynen in the text above.]

occasion to the hostile press abroad to generalise their statement, and thus misapply it.

Details of the case before the Rota

The case with which the judgment deals is one that occurred in the city of Rome. It was the case of a priest summoned before the ecclesiastical court by a layman who sought to recover a sum of money, due to him, as he claimed, by the priest. The priest, on the other hand, demanded that the case should be tried in a secular court, and among other reasons he alleged : " Perchè, date le condizioni in cui versa attualmente la Chiesa in Italia e in quasi tutte le nazioni, è reso impossibile ad essa l'esercizio della sua competenza."[1] In other words, he contended that, because it has been made practically impossible for the Church to apply fully the *Privilegium fori*, therefore the *Privilegium*, even in Rome, should be abolished. Thus we meet here with the propositions condemned in the Syllabus (Nos. 59 and 61) of Pius IX,[2] viz., that from the existence of an accomplished fact one is justified in inferring that it is in accordance with law.

The only possible decision

As to this, manifestly, no other decision could have been given by the Rota than that the *Privilegium fori* could not be abolished by any secular law, or by any mere custom to the contrary, inasmuch as any such decision would conflict with the freedom of the Church : even the Pope himself could not give up the *Privilegium* absolutely ; he could only revoke it in various countries in view of the circumstances prevailing there ; against acts of the civil power setting aside the privilege of its own accord, the Pope has vigorously protested : if the Church is overborne by the strong hand of the State, it does not follow that she surrenders her rights.

The Pope alone, as the Rota declares, can in any way

[1] [That is: "Since the conditions in which the Church is now placed in Italy, and in almost all countries, are such that it has been made impossible for her tribunals to exercise their jurisdiction."]

[2] [PROP. 59. " Jus in materiali facto consistit, et omnia hominum officia sunt nomen inane, et omnia hominum facta juris vim habent."

PROP. 61. " Fortunata facti injustitia nullum juris sanctitati detrimentum affert."]

alter or abrogate the *Privilegium fori*. He can do this in two ways: 1. expressly, by Concordats; and 2. tacitly, by virtue of a juridical consent, in those cases in which the conditions required by law for the existence of a contrary custom are present.[1]

It is a fundamental error to assume, as the priest did in the case before the Rota, that a contrary custom, considered as a mere fact, could abrogate a law; this would, on the contrary, be a "corruptela juris." By the Canon Law, the consent of the legislator must be superadded,[2] and that consent has been given once for all by Gregory IX in the case of every custom, even when the custom is in conflict with a law, provided only that it is a "reasonable custom," and that it has lasted for the length of time prescribed by law.[3]

If some canonists hold that a custom against the *Privilegium fori* cannot but be unreasonable, what they refer to is a custom that is subversive of the very principle of the *Privilegium*, and that would thus involve the destruction even of the immunity of the Pope himself from the secular jurisdiction. But this in no way precludes the establishment of a reasonable custom, in reference to other ecclesiastics, in any particular country, in view of the circumstances of the place.

This is clearly expressed by Wernz, the present General of the Jesuits, one of the most distinguished canonists of our time, in the following words quoted already in my first article :—

The true canonical doctrine

Consuetudo, cum vi juris divini abrogandi prorsus destituatur, *forum privilegiatum R. Pontificis nullo unquam tempore aufere valet*, at *immunitas inferiorum clericorum*, quo ambitu, expressa Rom. Pontificis concessione, in multis regionibus immutata vel quoad substantiam abrogata est, eodem etiam, *longaeva consuetudine*, in aliis regionibus *immutari vel tolli potest*.

Quod enim, temporum ratione habita, R. Pontifex non paucis regionibus concessit, profecto nequit esse praxis irra-

[1] [See pages 19-21.]
[2] [See pages 18, 19.]
[3] Corp Jur. Can. c. ult. x. 1. 4; c. 1. vi. 1. 2

tionabilis, licet sit minus perfecta et favorabilis Ecclesiae; at etiam in aliis regionibus eaedem possunt vigere circumstantiae, ergo rationabilitas, sive prima legitimae consuetudinis conditio, non deest.

Qua conditione posita multo facilius habetur altera, quod consuetudo debeat esse legitime praescripta.[1]

Against the *Privilegium fori* of the Pope himself, inasmuch as it is of divine right, no right of custom can prevail. But it is different in the case of other ecclesiastics. Since, in consequence of the altered circumstances of the times, the Pope has in particular countries expressly abrogated the *Privilegium fori*, so too a custom may be formed which has the force of law, and cannot be called unreasonable, if only it has been in existence for the prescribed period of time. If such were not the case, the Concordats entered into by the Holy See should be called "unreasonable" and "a corruption of law."

Now the decision of the Rota in the case mentioned, is in no way opposed to the doctrine thus explained, nor does it in any way conflict with it. The priest in question had asserted that the *Privilegium fori* had no longer any value *de jure* because in present circumstances the application of it had been rendered impossible *de facto*. To this the answer was given: That is not so: no one but the Pope could abrogate the *Privilegium fori*.

The decision of the Rota

The present case refers to Rome and Italy only, where, on account of the absence of the Papal consent, there can be no question of a validly established custom to the contrary. The Holy See has repeatedly protested,—as was frequently done, for instance, by Pius IX—when, in disregard of the *Privilegium fori*, ecclesiastics were summoned before the secular courts. Then, as on the one hand, the Church can never surrender the principle of the *Privilegium*, because such a surrender would involve that of the immunity of the Pope, which is based on divine right, so neither, on the other hand, can an accomplished fact ever

[1] Wernz, *Praelectiones de Judiciis Civilibus*, Romae, 1889, p. 290.

turn wrong into right as was argued on behalf of the priest whose case was dealt with by the Rota. And as the Holy See has protested over and over again against violations of the *Privilegium fori* in Rome and in Italy,—so that there can be no question of the "tacit" consent of the Pope,—the sentence of the Rota might well declare the custom set up in opposition to it to be a "corruptela juris." I would myself have subscribed without hesitation to such a judgment.

From this, of course, it by no means follows that with respect to other countries a legitimate custom might not, in special circumstances, be established with the consent of the Pope. That in Germany such a custom has been in existence *de facto* since time immemorial, and that the Holy See has given its tacit consent to it, inasmuch as it has never protested against it, is a fact so notorious that it stands in no need of proof.

A custom in Germany from time immemorial

Even if a bishop of a particular diocese should make known the Motu Proprio through his official diocesan organ, such a communication would not have the effect of abrogating a custom that exists throughout the whole country. The validity or non-validity of a law does not depend on the publication or non-publication of it by any individual bishop. All this is so obvious to canonists that it would be superfluous to dwell upon it any further.

Hence it follows that neither myself nor the *Kölnische Volkszeitung* have been "disposed of" by the discovery of Herr Müller, the Roman representative of the *Tägliche Rundschau*, or by the appropriation of his discovery by the rest of the Liberal press. They will only have to go in search, then, of new "discoveries."

But what about the abrogatory formula: "Contrariis quibusvis non obstantibus"? Let us, says the *Kreuzzeitung*, listen to the words of the Motu Proprio itself, distinctly stating that everything to the contrary of what it prescribes is of no avail,—that is to say, that the German right of custom advanced by Heiner as hindering the application of the Motu Proprio is declared by the Pope himself to be of no force at all. Even Professor A. Schulze of

Contrariis quibusvis non obstantibus

Freiburg im Breisgau writes in the *Kölnische Zeitung*, No. 1328, in italics:—"It (the Motu Proprio) concludes by expressly invalidating every provision to the contrary."

One could hardly believe it possible, that even jurists engaged in the teaching of Catholic Canon Law in German Universities, should be ignorant of the meaning of the legal abrogation formulas.[1] If Professor Schulze had read only five pages further in the same number of the *Acta Apostolicae Sedis* which contains the Motu Proprio *Quantavis diligentia*, he would have met with another Motu Proprio with the following abrogation clause:—"Contrariis quibuscumque, *etiam specialissima mentione dignis*, minime obstantibus." Surely the following question would then have occurred to these learned gentlemen: Must there not be some difference between these different abrogatory clauses? And they could have derived instruction as to the difference between them from Catholic Manuals of Canon Law.

I quote here only one, the work of a Roman Canonist, Santi, in his *Praelectiones Juris Canonici*, where he treats of the abrogation and consequently the abolition of a right established by custom, and teaches expressly, in accordance with all canonists, that a particular custom is not abrogated by a general clause such as we find in the Motu Proprio. If the custom of a particular country, or particular ecclesiastical province or diocese, is to be abrogated, this must be expressly mentioned in the abrogating clause, as, for instance, in the clause contained in the other Motu Proprio of Pius X above referred to.

Abrogatory clauses

[1] [This reference to Professor Schulze as a jurist "engaged in the teaching of Catholic Canon Law" in a German University,—the University in question being that of Freiburg, which is one of the German Universities in which there is a Catholic Faculty of Theology,—might easily give rise to a misunderstanding.

Professor Schulze is not a Catholic. He is one of the professors in the Faculty of Law, and his primary subject is German law. But he deals also with the Canon Law, in certain scientific aspects of it. It is not uncommon in German Universities, to find a chair such as that of Professor Schulze held by a Protestant.

In those universities in Germany in which, as at Freiburg, there is a Faculty of Catholic Theology, there is in that faculty a chair of Canon Law. Such a chair is held, of course, by a Catholic. The chair of Canon Law in the Faculty of Theology at Freiburg was that held until recently by Mgr. Heiner.]

I have neither time nor inclination to enter upon the refutation of other statements and commonplaces of the liberal press, because that press, as I have said before, can neither be instructed nor converted. In particular, the insulting personal remarks of certain correspondents and writers leave me quite unmoved ; I had, they say, the " impudence " to oppose the validity of the Pope's decree for Germany!

For them, the Motu Proprio must under all circumstances be proclaimed to have the force of law for Germany, because they have absolute need of it at the coming elections as a weapon of attack against the Church and the Centre party.

(C.)

MGR. HEINER'S FURTHER REPLY TO HIS CRITICS.[1]

Articles and letters from Liberal and other anti-Catholic journals keep pouring in upon me every day. The tendency of all of them is the same: the Motu Proprio must under all circumstances have the force of law in Germany, and its validity must be held intact; every attempt to cancel its validity, or even to weaken it, must be vigorously withstood; and all because the Motu Proprio is to be used as a powerful weapon in the combat against Ultramontanism and the Centre party, and, in the last instance, of course, against Rome and the Catholic Church itself. Strange indeed! Hitherto the press of our opponents has always set itself in opposition to Papal decrees, but now it defends their application to Germany against the Catholic Press!

Anti-Catholics and the Motu Proprio

The grounds, too, that are relied upon in favour of the validity of the Motu Proprio for Germany are generally so futile, and are in such flagrant contradiction, not only with the principles of Canon Law, but also with the actual circumstances of Germany, that one cannot but wonder how even self-styled "Canonists" have the courage to come into the field with such rusty weapons.

Futile grounds

We have here especially in view an article in the *Kölnische Zeitung* of the 8th of December, No. 1346, under the heading: "A Canonist on the Motu Proprio." The only pity is that the "Canonist" had not the courage to write over his own name. As a proof "that the *Privilegium fori*, if not *divini juris*, is nevertheless most closely connected with the Divine law," he quotes the 30th proposition of the Syllabus of 1864, in which the following proposition is con-

A "Canonist" on the Motu Proprio

[1] (Translated from the *Kölnische Volkszeitung* of December 15th, 1911.)

The Syllabus of 1864

demned namely, that "the immunity of the Church and of ecclesiastical persons,"—and to this immunity the *Privilegium fori* belongs,—"has derived its origin from civil law."[1] From this condemnation our "Canonist" draws the conclusion that, "this being admitted, no right derived from a custom contrary to the *Privilegium* ever can be formed."

Roman teaching

But what about the fact that in the chairs of law in schools under Papal authority in Rome, as well as in works published in Rome with approval, the contrary of all this is taught without disguise. Our "Canonist" has quite misunderstood the 30th proposition of the Syllabus.

The error condemned in that proposition is the following:—"The immunity of the Church and of ecclesiastical persons derived its origin from civil law." It is true, indeed, that the condemnation of this proposition, taken from the anti-Catholic author, Vigil,[2] has been the occasion of much criticism and even invective directed against the Church. To the present day, we find use made of it, over and over again, as a proof of the boundless claims and insatiable demands made by "Ultramontanism" upon the modern state, with which that immunity is supposed to be absolutely incompatible, inasmuch as in the modern state all are equal before the law. But the proposition is entirely misunderstood, and the condemnation of it mistakenly condemned, and this, not only by the opponents of the Syllabus, but also by many Catholics, who are at a loss to understand how a purely historical question on the origin of ecclesiastical immunity could ever have been made the object of an ecclesiastical condemnation.[3]

The Holy See would undoubtedly have put the propo-

[1] [PROP. 30. Ecclesiae et personarum ecclesiasticarum immunitas a jure civili ortum habuit.]

[2] [The 30th proposition of the Syllabus is taken from a work, in six volumes, published in Spanish, at Lima, by F. G. Vigil, in 1848, under the title "Defensa de la autoridad de los Gobiernos y de los Obispos contra las pretenciones de la Curia Romana."

This work, from which no fewer than seven of the propositions in the Syllabus are taken, was condemned by Pius IX, in an Apostolic Letter of the 10th of June, 1851.]

[3] [In his famous "Letter to the Duke of Norfolk," written in reply to Mr. Gladstone's ill-informed dissertation on "Vaticanism."

sition in an entirely different form, if it had not appeared as stated above in the work from which it was taken. As it stands, however, inasmuch as it asserts that the immunity of the Church as such derives its origin exclusively from civil legislation, so that the latter can at pleasure withdraw it absolutely, the proposition is clearly erroneous. Ecclesiastical immunity, as such, does not derive its origin merely and exclusively from civil legislation; although by civil legislation there have been granted to the Church certain specified immunities. Ecclesiastical immunity, as such, is based on the natural feelings of mankind towards the Almighty and towards persons and things consecrated to His service. It is these religious feelings, as well as other considerations of what was equitable and becoming in their dealings with the Church, that Christian legislators took into account when they bestowed upon the Church a series of immunities, some granting more, others less, according as they saw that one or another special immunity was useful or was called for by the religious character of the persons, and by the purpose of the things, that were dedicated to God's service.

A proposition: why it was condemned?

Now, in the proposition that we are considering, there is

Dr. Newman has an interesting reference to the writer from whose work the condemned proposition here in question is taken.

Having stated that "in order to see the nature and extent of the condemnation passed on any proposition of the Syllabus, it is absolutely necessary to turn out the passage of the Allocution, Encyclical, or other document in which the condemnation is found, Dr. Newman quotes Mr. Gladstone's description of the condemnations as "extraordinary declarations on personal and private duty," and as "stringent condemnations." He then continues:—

"I certainly must grant that some are stringent, but only some.

"One of the most severe that I have found among them is that in the Apostolic Letter of June 10, 1851, against some heretic priest out at Lima, whose elaborate work in six volumes against the Roman Curia, is pronounced to be in its various statements, 'scandalous, rash, false, schismatical, injurious to the Roman Pontiffs and Ecumenical Councils, impious, and heretical.'

"*It well deserved to be called by these names*, which are not terms of abuse, but each with its definite meaning; and if Mr. Gladstone, in speaking of the condemnations, had confined his epithet, 'stringent' to it, no one would have complained of him."—("*A Letter addressed to His Grace the Duke of Norfolk, on occasion of Mr. Gladstone's recent Expostulation*," *London*, 1875, *pp.* 83, 84.)

The condemnation of the proposition explained

no reference whatever to any special immunities—some of which may have derived, and actually have derived, their origin from civil legislation. There is question only of the immunity of the Church, and of ecclesiastics, in general. Hence in the condemnation of the proposition it is not denied that the Church owes some specified immunities to civil legislation. Nothing more is implied in the condemnation than that the origin of the establishment of ecclesiastical immunity in general is not to be traced, exclusively, to the legislation, or the mere good will, of civil legislators, as if they were not influenced in the matter by the common feeling of respect for religion.

I have explained this in detail in my work: *The Syllabus of Pius IX.* (Mayence, 1905), page 156, continued as follows on page 159:—

"Hence it is easily understood why modern legislation, which has abandoned the Christian standpoint, no longer recognises the immunity of the Church, but has abolished it in most countries, although, in a few, some particular portions of it have been preserved, out of respect for the religious feelings of the Christian community. Want of faith, irreligion, indifferentism, hatred of Christianity in general, and of Catholicity in particular, are, amongst 'Anti-Ultramontanists,' even at the present time, the real cause why they are striving so bitterly against the immunity of the Church, and why they long to remove the last remains of that immunity wherever it still exists."

The condemnation, then, of proposition n. 30 of the Syllabus can in no way be adduced to prove that a lawful custom may not have been formed in individual countries at variance with some specified immunities, and also, therefore, at variance with the *Privilegium fori.* The ecclesiastical immunities indeed are based on divine right, as the Council of Trent expresses it, but they do not constitute divine right.

How, indeed, could the Pope have been able to grant concessions in various instances to individual states by means of Concordats abrogating the *Privilegium,* if the ecclesiastical immunities—in the present instance the *Privilegium fori,*—constituted a divine right? Even the

Pope himself is subject to the Divine law, not placed in authority over it; and therefore in no circumstance can he ever abrogate that law, dispense from it, grant concessions or exceptions derogatory to it, and so forth. The fact, then, that the Pope has actually done this in the case of the *Privilegium fori*, is, as Wernz says in his work quoted by me in my two former articles in the *Kölnische Volkszeitung*, a conclusive proof that in certain circumstances a custom at variance with the *Privilegium* may be reasonable, and that therefore a customary right may be formed. This would establish the first condition of a lawful custom, that is to say, its reasonableness.

Now let us examine the second condition of a valid custom, namely, its legal prescription (*praescriptio longaeva*), which Pope Gregory IX, in the Decretals, requires in all cases in which the *consensus legalis* is required to make a custom effective. As regards the abrogation of the *Privilegium fori* in Germany, has this condition also been fulfilled? Undoubtedly it has. But, says the "Canonist" of the *Kölnische Zeitung*:—"Heiner assumes all this without proof. In particular, he takes no account of the uncommonly difficult question of the necessary time that must have elapsed before a right acquired by custom becomes lawful."

Praescriptio longaeva

The "Canonist" again

The "Canonist" then continues:—

"Even Wernz, whom Heiner brought forward as an authority, says at the end of the quoted passage: 'debet (consuetudo) legitime esse praescripta,' that is the custom must have lasted for the time required by law. The canonical time of legal prescription in this matter is now taken to be 40 years. Now in the German Empire, the ecclesiastical jurisdiction was abolished by the law of the 27th of November, 1877, which came into operation on the 1st of October, 1879. Since 1879, forty years have not yet elapsed, so that a right of custom cannot as yet have been formed. Or will Heiner, following the opinion of some few individual canonists (Schulte), assert that a shorter time

The German Empire

is sufficient? But by virtue of what law? Or in conformity with what practice? On all this critical matter Heiner is silent"

Then the criticism continues:—

"There is another point of view. When a right is to be established by custom, does the whole German Empire enter into account, or is the custom of each separate State to be the criterion? In any case, the laws of the separate States will have to be taken into account for the period before 1879. How, then, will Heiner compute and point out the beginning and the completion of the requisite time of legitimate prescription, for instance in Prussia? And how for the other individual states? Here again Heiner is silent. And yet anyone asserting that a derogatory right of custom exists, is, as a matter of course, bound to prove it.

"I am greatly afraid that Heiner, with the good and quite intelligible desire of calming excitement amongst the Catholics of Germany, has asserted more than he can prove, and has taken upon himself a responsibility which he cannot support.

"Austria I put aside. But here also Heiner's explanations are not calculated to confirm belief in his authority.

The Austrian Concordat of 1855

The Concordat of 1855, no doubt, abolished the *Privilegium fori*.[1] Quite so, but was not the Concordat of 1855 abolished by the act of Austria itself in the year 1874, and thus divested of its validity? After a Concordat has been thus abrogated by the State, is it legally permissible to the State to hold on to the advantages that were conceded to it by the Church in the making of the Concordat. In this case, also, Heiner will find few to assent to his views unconditionally."

And then comes our "Canonist's" last point:—

How can the Motu Proprio be in force anywhere?

"The confident assumption that the Holy See does not endorse Heiner's opinion, is confirmed by the point already made in the *Kölnische Zeitung*, namely: Where, then, is the Motu Proprio valid? Heiner asserts that it will apply only, or at least chiefly,

[1] [See page 71.]

to Italy. That, no doubt, may be supposed to be correct. Occasion for the publication of the decree was given by the proceedings before the Roman civil courts in connection with a lawsuit arising out of an alleged violation of the secret of the Confessional. But if a custom by reason of which the *Privilegium fori* has been abrogated, was formed, —as Heiner considers that it was formed—in Germany, does not the same apply in at least equal measure to Italy? For in Italy the *Privilegium fori* has been abolished at least since 1859 (the time of the annexation of the Marches, etc.), and therefore for a much longer time than in Germany. Is it, then, that the Holy See has given to its canonists a law which is of no authority even in places where it is of importance to the Holy See that it should be upheld?"

As many errors as there are statements

Here we have as many errors as there are statements. For my part, I have always been of opinion that facts that are notorious need no other proof. Our "Canonist" sets out from the proposition that for a custom the canonical time of prescription is forty years. "In the German Empire," he says, "the ecclesiastical jurisdiction was abolished by the law of the 27th of November, 1877, which came into operation on the 1st of October, 1879. Since then, forty years have not yet elapsed, so that a right of custom cannot as yet have been established."

As to this, I am quite willing to admit that a right of custom cannot be formed in less than forty years. This I have stated in my Manual of Canon Law (Vol. 1, page 43) where, after giving a summary of the different views held on the subject, I say: "Meanwhile the opinion that a period of forty years is required for the establishment of a right of custom is the most general and the most probable."[1] But then, the "Canonist" proceeds to assert that, in Germany, the ecclesiastical jurisdiction was abolished by Section 15 of the law of the 27th of November, 1877, which came into operation on the 12th of October, 1879; that, since

[1] [Unquestionably it is sufficient. See page 21.]

then, forty years have not yet elapsed and that consequently no right of custom can have been established.

So that, according to our "Canonist," it is by the legislation of 1877-79, that what he calls the "ecclesiastical jurisdiction" has been abolished in Germany! Of course he means by "ecclesiastical jurisdiction" an ecclesiastical jurisdiction in the secular sphere or in secular affairs, because the jurisdiction of the Church in purely ecclesiastical or spiritual affairs, as well as in matters pertaining to the ministry and discipline of the clergy, has never been interfered with.

The Corpus Juris Fridericiani

In the *Privilegium fori*, there is question only of a jurisdiction in secular affairs. And this, our "Canonist" tells us, was not withdrawn from the Church in Germany before the legislation of 1877-79. And yet, all that legislation, which placed the Catholic clergy in civil as well as in criminal affairs on an equality with the laity, was then accepted by Parliament! How could this possibly have occurred if that equality had not been established before then? Must not the thought have occurred to our "Canonist," that, at that time, the consent of Parliament could not have been obtained if the *Privilegium fori* had not long previously ceased to have effect in the different states of Germany?

The German legislation of 1877-79

But he now asks: How will Heiner compute and point out, for instance in the case of Prussia, the beginning and the completion of the time of prescription for this custom? Here also, he says, I remain silent. Certainly, I did remain silent because I thought it impossible that any Canonist should be unaware that the *Privilegium fori* has never been in existence in Prussia from the time when the Prussian Kingdom began. Our "Canonist" seems never to have heard anything about the *Corpus Juris Fridericiani*, or about the Prussian Landrecht of 1792!

The custom against the Privilegium in Prussia

In matters governed by the law of the State, the Canon Law was already superseded by the *Corpus Juris*

Fridericiani,[1] which (Part I. lib. I. Tit. 2. § 12) enacted as follows :—

"Since, by virtue of the Treaty of Westphalia, our Catholic subjects are to be judged in accordance with their religious principles in all matters of faith, therefore must the Canon Law be preserved in force, in so far as it is necessary for that purpose.

"But in all temporal affairs we will have the *Jus Canonicum* abolished, except with respect to the *officia* and *dignitates* [of the chapters], and the *jura* made dependent on them by the founders, and with respect also to questions concerning tithes, which we order to be decided according to the Canon Law even among our Protestant subjects."

The *Corpus Juris Fridericiani* was replaced by the Prussian Landrecht of 1792, and in particular, as to the Canon Law, by Title 11, Part 2, of the Landrecht. This, however, in no way modified the principle, above quoted, of the earlier code, which, in fact, it closely followed.

Von Kamptz (*Year-book of Prussian Legislation*, 58, page 61) gives as follows the provision regarding the clergy as it was proposed in the draft of the scheme: "As for Catholics, their rights and duties in the exercise of their spiritual ministry are determined by the provisions of the Canon Law." Carmer states it in the following form :—"The rights and duties of a Catholic priest are determined by the provisions of the Canon Law." But on this, Suarez[2] notes :—"From the omission of the words 'in the exercise of their spiritual ministry,' the paragraph acquires a misleading and erroneous sense. For it is only *ratione internorum officii* that the provisions of the Canon Law are upheld, not with respect to exterior relations and rights." Moreover, the exception—"with respect to the *officia*," etc.,—made by the *Corpus Juris Fridericiani* to the general exclusion of the Canon Law in matters of temporal concern,—was removed by the Landrecht which provided in another way for that matter.

[1] [This was the famous code the compilation of which was carried out under the direction of Frederick the Great at intervals between 1748 and 1776.

The subsequent Prussian Landrecht was brought out in the reign of Frederick's successor, Frederick William II, in 1792-4.]

[2] [A German jurist; not, of course, the well-known theologian.]

As to the application of the laws of the State to ecclesiastics, the Landrecht enacted, in particular, as follows (P. II. t. 11, § 98):—"In all concerns of civil life, ecclesiastics, without distinction of religion, are judged by the laws of the State." And paragraph 536 decrees:—"If a parish priest has rendered himself guilty of civil transgressions which are matter for criminal investigation, the ecclesiastical superiors are bound to suspend him and leave the matter to the decision of the civil authorities." And paragraph 537:—"But the civil authority may, without waiting for any preliminary step, arrest the accused, and take legal proceedings against him."

A prescription of over a hundred years

According to all this, then, the *Privilegium fori*, that is to say, the jurisdiction or competence of the Church with regard to the civil or criminal affairs of the clergy, has been abolished, whilst, on the other hand, its jurisdiction in matters concerning the exercise of the ministry and clerical discipline remains unaltered. Now, neither the Holy See nor the Episcopate has ever objected to this state of things, and consequently, the *Privilegium fori* has not, for the last hundred years and more, been in force in Prussia.

Other German States

The same applies to the other states of Germany since the secularization of the ecclesiastical principalities. For instance, in the Constitutional Edict of the 14th of May, 1807, for the Grand Duchy of Baden (*Official Journal*, 1818, page 101), it is enacted in paragraph 14:—"All investigations in civil judicial affairs must issue from the ordinary courts," and in paragraph 15:—"No one is to be withdrawn from the jurisdiction of his regular judge in criminal affairs." In the "Law concering the legal status of Churches and Ecclesiastical Associations," of the 9th of October, 1860 (see Heiner, *Laws Concerning the Catholic Church in Baden*: Freiburg in Breisgau, 1890), it is laid down in Art. 13, that "in their civil and political relations, the Churches, their institutions, and ministers, remain subject to the laws of the State." In Baden also, then, there can be no question of the abrogation of the *Privilegium fori* for the last hundred years and more.

The same or similar legal provisions exist in all the remaining German States. It would be impossible for me to gratify the "Canonist" of the *Kölnische Zeitung*, by quoting all of them for him here. But let him ascertain the facts for himself, and then kindly communicate with me as to where, in any of the German States, the *Privilegium fori* now exists.

And now let us consider Austria, which the "Canonist" speaks of leaving aside,[1] but about which he nevertheless writes :—

"In this case also Heiner's explanations are not calculated to confirm belief in his authority. It is said that in Austria the Concordat of 1855 abolished the *Privilegium fori*. Quite true. But the Concordat of 1855 was abolished by Austria in 1874, and was thus deprived of its validity.

"Is it legally admissible to hold on to the advantages granted to the State—supposing them to have been granted by the Concordat—although the State itself abolished the Concordat, and, together with it, the privileges bestowed on the Church ?

"Here also Heiner will find few ready to assent to his views unconditionally."

The Austrian Concordat of 1855

In my first article I did not, indeed, enter much into detail with respect to Austria, but my reference to Articles XIII. and XIV. of the Concordat of 1855 will have been considered sufficient by all who have even the faintest idea of the practice of the Holy See with respect to a Concordat that has been broken by the one-sided action of a State. The favours that have once been granted by the Holy See to a secular government remain in full force, unless the Holy See decides to the contrary, as, for example, Pius X has done in the case of France.

Amongst other proofs of this there is the fact that those privileges which the Holy See has granted to the subjects of a secular power on the occasion of a Concordat, remain unimpaired after the Concordat has been broken through by the State. This is attested by the tacit recognition of those rights that are valid solely by virtue of concessions bestowed in the Concordat. This is clearly established by the Concordat

[1] [See page 103.]

concluded with the King of Naples in 1818. Even in the case of princes, who, by their arbitrary and unjust abolition of Concordats have broken their words, the concessions and favours previously bestowed remain intact unless they are expressly revoked by the Holy See.

All these facts are so well known that it would be a waste of time and of ink to set about proving them. Hence it is that it has never occurred either to the Holy See or to any Austrian bishop to claim the *Privilegium fori* for the Austrian clergy on the ground that the Concordat had been abolished. Austrian expositors of the Canon Law are unanimous in holding that the *Privilegium fori* has been definitely abolished, so that, even to the present day, notwithstanding the abolition of the Concordat by the State itself, the *Privilegium* no longer exists in Austria.

"Where, then," finally asks our "Canonist," together with the other champions of the validity of the *Privilegium* in Germany,—where, then, is the *Privilegium fori* in existence? Is it perhaps among the blacks? And he continues:—

"Heiner asserts that it will apply only, or at least chiefly to Italy. That may certainly be supposed to be correct. Occasion for the publication of the decree was given by the proceedings before the Roman civil courts in connection with a lawsuit arising out of an alleged violation of the secret of the Confessional.

"But if, as Heiner considers, a custom by reason of which the *Privilegium fori* has been abrogated, was formed in Germany, does not the same apply in at least equal measure to Italy? For in Italy the *Privilegium fori* has been abolished at least since 1859 (the time of the annexation of the Marches, etc.), and therefore for a much longer time than in Germany.

"Is it, then, that the Holy See has given to its canonists a law which is of no authority even in places where it is of importance to the Holy See that it should be upheld?"

The Verdesi case in Rome

The "Canonist" of the *Kölnische Zeitung* seems to get quite confused over his own doubts and entangled in his sophistries. Let it be observed in the first place, that the Verdesi case in Rome was by no means the determining cause of the issuing of the Motu Proprio. There were also in view other famous cases, quite dif-

ferent ones. The argument, however, that, if the *Privilegium fori* has, by virtue of custom, been abrogated in Germany the same result should have followed for Italy, does not speak much for "canonical" ingenuity.

The protests of the Holy See

Does the "Canonist" not know that the Holy See has frequently and solemnly protested against the abolition of the *Privilegium fori* by the Italian laws, and that, therefore, no right of custom could have been formed in Italy in opposition to the law of the Church,—the *consensus tacitus* or *legalis* of the legislator not having been given to the abrogation of the law in that country as it was in Germany? The same happened also in several other Catholic States, especially in South America, where, just as in Italy, the *Privilegium fori* has never been surrendered by the Church. Therefore the *Privilegium* is not confined to "the blacks" only

But I am wearying the reader with explanations which after all can produce no other effect than to call forth some smiles at the learning of the "Canonist" of the *Kölnische Zeitung*. Nor can I enter here upon the examination of an indefensible article of a "Canonist" in the *Tag*: that can be better done in another place.

In the meantime we may await an official declaration as to the validity or invalidity of the right of custom in Germany; in any case, such a declaration will serve to calm down excitement, especially amongst German Catholics. It may be that, on the part either of the German or of the Prussian Episcopate, an application in this matter has already been made to Rome.[1]

This is my last word. What I have written, I have written through love of the Church, and of my Father-land, Germany.

[1] [That such an application has been made, not by the German or Prussian Episcopate, but by the Prussian Minister accredited to the Holy See, we have already seen, as we have also seen the decisive result of that application. See pages 57-59.]

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